S. HRG. 99-92

PROPOSED ASBESTOS CLAIMS FACILITY

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

ENCOURAGING AND FACILITATING NEGOTIATED SETTLEMENTS, PROMOTE FAIR, CONSISTENT, AND TIMELY RESOLUTIONS OF ASBESTOS-RELATED CLAIMS, ENCOURAGE THE RESOLUTION OF DISPUTES THROUGH NON-JUDICIAL PROCEDURES, AND TO ENCOURAGE WAIVER OF PUNITIVE DAMAGE CLAIMS

MARCH 19, 1985

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PROPOSED ASBESTOS CLAIMS FACILITY

TUESDAY, MARCH 19, 1985

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:39 a.m., in room SD-430, Dirksen Senate Office Building, Senator Don Nickles, (chairman of the subcommittee) presiding.

Present: Senators Nickles and Metzenbaum.

OPENING STATEMENT OF SENATOR NICKLES

Senator NICKLES. Good morning. Today's hearing on the Asbestos Claims Facility is a continuation of a 3-day oversight hearing on occupational disease conducted by this subcommittee last year.

At that time we heard from victims, doctors, trial lawyers, producers, insurers, organized labor, academics, and others. The focus was on whether or not there is a national asbestos crisis and, if so, what should be done about it. Witnesses presenting many varying and often conflicting points of view were heard from.

Today, we will hear testimony on a private sector initiative often referred to as the Wellington group. I am very pleased that the producers and insurers have worked together for their own solution rather than demanding Federal legislation. Today we will be receiving testimony on how this proposed facility will operate, as well as their timetables to put it into operation.

The subcommittee unsuccessfully attempted to get a nonsigning insurer or producer or reinsurer to present their views today. We would still like to receive their written views for the record, as well as views from other conditional signatories, trial attorneys, victims, and other affected parties.

Since many individuals will not know the details of this proposed facility until after today's hearing, we will keep the record open for 6 weeks until April 30, 1985, rather than the customary 30 days, to allow ample opportunity to complete the record.

Again, I want to congratulate the parties for working together toward a common solution and for the willingness to explain to this subcommittee how the proposal will operate.

I am very pleased that Senator Metzenbaum has joined us this morning. I know he has an interest in occupational disease. Senator Metzenbaum, do you have any opening comments?

Senator METZENBAUM. Yes; and that is—that I look forward to this hearing both with some concern as well as with some reserva-

tions. I do not question the fact that the asbestos exposure and the amount of litigation has become a national issue.

Also I am not unaware of the fact that these claims were a matter of some major concern when the Judiciary Committee was wrestling with the bankruptcy amendments just last year. Now, one of my concerns that I raise at the moment is why the U.S. Senate Labor Committee's first hearing—and I think it is its first, at least this year.

Senator NICKLES. The subcommittee, yes.

Senator METZENBAUM. Is dealing with an issue that is not truly a legislative issue. We have no pending legislation. We really have no oversight responsibilities with respect to this matter, and I am concerned as to whether or not this so-called Wellington plan—whether in some way the Senate Labor Committee is lending its offices to put its imprimatur on a program over which we have no regulatory rights, nor involvement.

I raise that to indicate my concern, but not really in a manner of jumping up and down and saying we should not be doing this, but rather just raising the issue so that it should be made clear to all those interested that by the conduct of this hearing or by the holding of this hearing, the Senate is not saying, or any of its subcommittees, that we look favorably on this program because we have given it an opportunity to be explained before this Labor Subcommittee.

Now, I do not think anybody disagrees that the litigative process is a long and drawn out one and sometimes we look for simple solutions. We find simple solutions in occupational employment where we have workers' compensation. To a considerable extent, that has worked well, but there are some reservations.

And then we have had proposals to deny those in automobile accidents their right to litigate their cases in the courts. I want to point out that in Dean Wellington's statement, he makes it very clear that the Asbestos Claims Facility is all voluntary and that a plaintiff desiring to litigate through the courts will still be free to go that road originally or at any time that the plaintiff should be dissatisfied with the Facility, so that the dean is sensitive to that concern.

I think in the last analysis, the issue becomes one of determining whether or not a worker's rights and asbestos insurance company interests are favored or hurt, or whether this contributes anything toward solving the problem.

I think there are many unanswered questions that will remain at the conclusion of this hearing. Having started off saying I am not sure we should be having a hearing, but at the same time saying, well, maybe the opportunity for some people to explain what it is has some value, provided that it is made very clear that this committee does not directly nor indirectly approve nor disapprove of the plan, but is willing to listen to the factual data in connection with it, I do note this, Mr. Chairman.

You mentioned that some who are nonparticipants—some effort was made to bring them in to be heard and that they were not receptive to doing that, but the record will be kept open. I notice that there is no indication that anyone from the so-called plaintiffs' bar is present, nor from the defendants' bar, for that matter.

I am wondering whether or not any effort was made to secure some statement from one or more of the legal profession representing plaintiffs' and defendants' bars.

Senator NICKLES. I think, certainly, the defendants' bar is represented. There are many companies involved who are participants in the Wellington group. Let me give the Senator a little more background on where we are.

I mentioned in my opening statement that we had 3 days of hearings. In those 3 days of hearings last year, we did have statements by the trial lawyers' groups. Most of our witnesses referred to the Wellington group as an ongoing process.

At that time, the Wellington group was not advanced nor to the conclusion that they were prepared to testify on their status. They are at that stage now, and this really rounds out or completes the hearings.

The magnitude of the hearings were such that we have enormous problems in litigation. Problems occur where the producer or the employer is willing to pay compensation, but the net result is that the injured employee is not getting compensation or if he did eventually, he went through years and years of litigation and receive only 30-some cents on the dollar (or less); the attorneys on both sides would get the other two-thirds.

To answer your question, is there legislation pending, there has been legislation pending. Last year Senator Percy introduced occupational disease legislation and, on the House side, Congressman Miller. There is some interest in legislation.

I have not introduced a bill because I have not seen the right type of a solution. There is much debate on who would pay what. The Wellington Group, again, is a private sector initiative that wrestles with this problem. I think it is wise for us to complete the record and find out what they have, where they are, and whether or not it looks like it would be a good, viable alternative.

Senator METZENBAUM. I am not objecting to doing that at all. I just sort of thought I would raise the issue, but I am certainly not suggesting that you not go forward with hearing these witnesses.

Senator NICKLES. Again, Senator, I appreciate your attendance. I think the magnitude of the problem is very significant and one that the country will be wrestling with for years. We are talking about billions of dollars and many lives are affected.

Our first guest today is Dean Harry Wellington, Yale Law School, New Haven. Dean Wellington, I have heard your name mentioned many times before this committee and I welcome you and look forward to your presentation.

STATEMENT OF HARRY H. WELLINGTON, DEAN, YALE UNIVERSITY LAW SCHOOL, NEW HAVEN, CT

Dean WELLINGTON. Thank you very much. Mr. Chairman and Senator Metzenbaum, my name is Harry Wellington, and I am a professor of law and the dean at the Yale Law School, but I am not here today in that capacity. I testify, rather, in my capacity as the neutral moderator of a private group of major asbestos producers and their insurers.

For well over 2 years, this group has wrestled with the extremely complex problem presented by the monumental mass of asbestos bodily injury litigation clogging our State and Federal courts.

More than 30,000 lawsuits have already been filed and new actions are being instituted at an average rate of 500 a month. That is the underlying product liability cases. Because it takes 15 to 40 years for asbestos injury to manifest itself, it can be expected that this avalanche of single matter litigation will continue to mount well into the next century.

Asbestos litigation in America has reached truly epidemic proportion, and I use the word "epidemic" not as a cliche, but as a reality. The enormity of the problem was underscored only 2 weeks ago when a $210,000 renovation had to be done on a special auditorium in San Francisco to accommodate an asbestos liability trial.

One newspaper reported the event under the headline, "Asbestos Trial Size Rivals Conventions." The article reported that lawyers from 46 firms took lottery-assigned seats for the start of a massive trial to determine who is liable for billions of dollars in asbestos-related injury claims.

The article stated that, "The trial, so huge it is being held in a specially renovated auditorium, could last for more than a year." I think the article understates when it says "could last for more than a year."

Senator NICKLES. Has that trial begun yet?

Dean WELLINGTON. Yes, March 4th.

Mr. Chairman, I have long been convinced that this situation is a serious and pressing public problem. And, Mr. Chairman, as one who trains lawyers, I now also see it as a genuine embarrassment to the legal profession.

Senator METZENBAUM. Dean Wellington, could I just ask, that matter in San Francisco, that tremendous gathering—was that an issue between a group of plaintiffs and the companies or the insurance companies, or was that just a litigation between companies and the insurance companies and no plaintiffs at all involved?

Dean WELLINGTON. I am not sure why you say "just," Senator Metzenbaum.

Senator METZENBAUM. Well, because I think there is sort of a feeling that all these plaintiffs' lawyers and the plaintiffs are creating all of these problems, and I want to be certain.

As I understand it, the San Francisco matter had no plaintiffs involved at all, but was just between the insurance companies and their clients.

Dean WELLINGTON. In that sense, it was just between the insurance companies and their policyholders, yes, sir. That is correct.

Senator METZENBAUM. Thank you for clarifying the record.

Dean WELLINGTON. But it is also a genuine embarrassment for the legal profession, and it is occupying the full time of a judge. It is clogging the courts, and from that perspective I would say it is not "just"; it is part of the difficulty that our group has been addressing.

At any rate, because of this embarrassment and because of the magnitude of the problem, I especially appreciate the opportunity to report to you today that not only have the members of our negotiating group agreed on a formula and mechanism for handling the

great bulk of these cases outside the court system, but we have also won agreement from a large enough number of additional producers and insurance companies to make us optimistic about the establishment and, we believe, success of the new mechanism.

The importance of such a historical development to our court system, to claimants, to producers, and to the insurance industry is absolutely clear. Let me cite the following dimensions of the critical need by all parties for a solution to this national tragedy.

First, the present backlog of asbestos suits in our courts is so extensive that in a city such as Philadelphia, five judges now handle full time nothing but asbestos cases, and they are barely making a dent in the cases waiting to be heard.

Second, the normal legal procedure for handling these cases is so inefficient and costly throughout the country that claimants with a real and immediate need are forced to wait years for a decision. Indeed, in some cases it is, in one sense, too late; death comes before decision.

According to a study by the Rand Corp.'s Institute for Civil Justice, almost two-thirds of judgments or settlements are going for lawyers and legal expenses. Claimants getting only 37 cents of each dollar awarded. That is unacceptable.

Senator METZENBAUM. Dean Wellington, I have not seen that report, and I agree with you that that is an unacceptable result. Have you taken a look at the report itself to determine impartially that it is objectively done?

I wanted to be certain that the 100 cents that we are talking about did not include defendants' expenses as well. You are saying 37 cents of each dollar awarded. The question is, does that mean 37 cents of each dollar paid?

Dean WELLINGTON. Let me put it in another way. According to the Rand report, in order to put $1 in the pocket of a claimant, of a victim, it costs insurance companies and producers, defendants, $2.71.

The Rand figure, as I recall it, is the award that goes to the claimant—the fee for his attorney averages 41 percent. Now, you asked me, Senator, whether those figures are accurate. I have been told by parties who are in the litigation that they are understated.

Senator METZENBAUM. Let me explain to you the reason for my question. I have before me—I think it is a copy of the Rand report, as I understand it, and it has a chart on page 124 of this green book; I think you have it there.

You will notice that they talk about $101,000 total expenditures on the right-hand side, and they say, then, $37,000 in defendant's expenditures, $25,000 in plaintiff's expenditures, and net compensation, $39,000.

Now, that is not exactly on this point because your point has to do with 37 cents of each dollar awarded. I would guess that that is in here somewhere, also. But the numbers get so close there, the 37's and the 39's and the 101's, that I am wondering whether or not there is any possible confusion that we are talking about $37,000. I just want to be certain where those facts and figures come from.

Dean WELLINGTON. I think they are in the report and I think I have stated it accurately.

Senator METZENBAUM. I am not challenging that.

Dean WELLINGTON. No, no; I understand that, Senator.

Senator METZENBAUM. Yes.

Dean WELLINGTON. But I think it is a correct statement, but I cannot testify, give evidence, on the validity of the figures. I do not have the underlying statistical information.

Senator METZENBAUM. I understand that.

Dean WELLINGTON. I do not know what their methods were.

Senator NICKLES. I might respond, Dean Wellington, and I will be happy to work with Senator Metzenbaum to bring him up to date. Again, this is kind of completing the 3 days of hearings that I know the Senator and his staff have looked at.

At our previous hearings we really got into the report and the amount of money. The Senator's statement is basically correct. I am just going strictly on recollection. The 67 percent or the two-thirds of the money that is going to attorneys included both defendants' and plaintiffs' attorneys, and I think that is the thrust of your question.

Senator METZENBAUM. Yes, that is the question.

Senator NICKLES. The hearings that we had were eye opening, at least they were to this Senator, as far as the magnitude of litigation on both sides, the money that was being expended, and the little amount of money that actually ended up to the claimants themselves. I will be happy to rehash some of those things.

Senator METZENBAUM. Normally, we look at what percentage does the client get of the amount awarded, and we say, well—I think we did just say that the lawyers were getting 41 percent.

Dean WELLINGTON. That is my recollection of the average.

Senator METZENBAUM. That is not nearly as——

Senator NICKLES. The defendants' attorneys were being compensated as well, and litigation on both sides is extremely expensive. There is no contention to that. If I remember, we had a couple of studies; I think the Rand study and some others. But I do not know that there was a lot of discrepancy. I think there might have been some figures bouncing around, 60 or 70 percent.

Senator METZENBAUM. Well, I guess what I am really saying is you could have a situation where the claimants wound up getting zero or less in a manner in which the defendant's counsel fees were so high that you could mathematically come out with that kind of result.

You could have $10 million of awards and you could have $12 million worth of defendant's lawyer's expenses. Yet, the plaintiffs in those matters might very well have wound up with $7.5 million out of the $10 million.

So you have got to be certain that you do not mix apples and pears, and I think by bringing in the defendant's expenses as a portion of the total dollars vis-a-vis the awards does bring in an outside factor that maybe should not be included.

I think we are mainly concerned, if a company winds up paying $100,000, how much does the claimant get.

Dean WELLINGTON. Right.

Senator METZENBAUM. And I think he does get more than 37 cents on the dollar, according to the way I now understand it. Your last statement would indicate he gets 59 cents on the dollar.

Dean WELLINGTON. Yes. I am sorry for that confusion, if there was some.

Senator NICKLES. Dean, please proceed, and I will try and refrain from questions and we will let you finish your statement.

Dean WELLINGTON. No; I do not mind.

Senator NICKLES. We have several questions that we want to get through. Please proceed.

Dean WELLINGTON. The third aspect of the problem is this: In the last 10 years—and again this is a Rand estimate—asbestos producers and their insurers have paid approximately $1 billion in compensation and legal expenses, and most of it, as I have said, to lawyers.

My ability to report to you that we have devised a precedent-setting alternative to this costly, inefficient litigation is a tribute to the wisdom and perseverance of those whose participation in these negotiations have brought us to this point.

While we have pursued a nongovernmental solution and have achieved it, we are indebted to Members of Congress, to Secretary of Commerce Malcolm Baldrige, and to others in Government who have supported our efforts.

Also, I must admit the private sector recognized the threat that if it did not produce an equitable solution, sooner or later Government would have to intervene and superimpose bureaucracy on an already clogged judicial system, probably not to the satisfaction of any parties to the problem.

The unique aspect of asbestos cases, in addition to their sheer numbers, is that since exposure may not result in identifiable injury until as long as 40 years later, the claimants often are unable to identify the company or companies to whose asbestos products they were exposed.

They therefore tend to sue every company that has had a history of asbestos involvement. As a result, the average suit currently has 20 defendants, and each defendant has his own battery of attorneys.

Greatly complicating the cases is the fact that the long latency period before injury is manifested raises exceedingly complex questions regarding insurer responsibility, as in the California case now being tried.

Even when a company is judged blameless, it still incurs large legal expenses. One company, by way of example, was involved in six trials over a 2-month period, and although it was exonerated of all responsibility in all six cases, its court and legal fees were unrecoverable.

Moreover, experience has shown that litigation does not provide equitable solutions for those who are injured. Two workers claiming injury from employment in the same shipyard but filing in different jurisdictions can find that one may eventually receive a large award and the other, with equal disability, may receive nothing.

Clearly, this situation is not only an embarrassment for our judicial system and for lawyers, it is a wholly unacceptable condition for plaintiffs and producers, as well as for their insurers.

Faced with this dilemma, and groping for a solution, the major parties, in October 1982, consulted the Center for Public Resources.

The center is a private, not-for-profit organization located in New York City, and dedicated to the reduction of conflict and the promotion of alternative and less expensive methods of dispute resolution.

Thereafter, I was selected to pursue the possibility of negotiating a totally private administrative agency to handle fairly and effectively the bulk of asbestos claims. The challenge, I can assure you, bore no resemblance to any to which a law school dean normally is exposed, although parenthetically I should say that law school deans normally are exposed to considerable challenges.

The parties responsible for taking the problem to the Center for Public Resources and those who constitute the membership of what has come to be known as the Wellington Resolution Group certainly have my respect and appreciation.

The resolution group consists of six major asbestos producers—Armstrong World Industries, Inc., the Celotex Corp., Fibreboard Corp., Owens-Corning Fiberglas Corp., Owens-Illinois, Inc., and Pittsburgh-Corning Corp.—and six major insurance companies—Aetna Life & Casualty, CIGNA, Continental Insurance, the Hartford Insurance Group, Liberty Mutual, and Lloyds of London.

However, though these parties had the wisdom to seek a rational solution to the problem, it can fairly be said that at the outset they agreed about little else. With my Yale colleague, Edward Dauer, and James Henry, the president of the Center for Public Resources, we set out on our difficult task to get to know each other and to persuade the parties, with their divergent views, to start talking to us and to each other.

Almost miraculously, by May 1984, the group had resolved its differences and had come to an agreement to establish the Asbestos Claims Facility, with proposed headquarters in Boston and a west coast office in San Francisco, to handle all of their asbestos claims.

To be successful, however, the Facility needed a much broader subscription among producers and insurers.

Senator METZENBAUM. Dean Wellington.

DEAN WELLINGTON. Yes?

Senator METZENBAUM. I wonder if I might interrupt you for a minute. I read your whole statement, and as I read it I got the endorsements and I understand what you are saying that it looks like it is a major breakthrough in this area.

I have another committee hearing, but I am interested in what you are doing; I am interested in the fairness of it and the equity of it. Very little of your statement addresses itself to the modus operandi, and I am wondering if I might interrupt you to ask you if you would tell us what happens to the individual claimant or group of claimants——

Senator NICKLES. Senator, let me interrupt you just for a second.

Dean, I have also read your statement, and it is unusual that you will find two Senators that happen to have read your statement. [Laughter.]

I have been in the Senate 5 years and it has happened once. [Laughter.]

Dean WELLINGTON. I am honored.

Senator NICKLES. If you do not mind, in view of the Senator's time constraints and the rest of our panelists as well, we will enter your statement in its entirety.

[The prepared statement of Dean Wellington follows:]

TESTIMONY OF HARRY H. WELLINGTON, DEAN, YALE UNIVERSITY LAW SCHOOL

Mr. Chairman and members of the Committee, my name is Harry Wellington. I am Dean of the Yale University Law School. But I testify today in my capacity as the neutral moderator of a private group of major asbestos producers and their insurers. For over two years this group has wrestled with the extremely complex problem presented by the monumental mass of asbestos injury litigation clogging our state and federal courts.

More than 30,000 law suits have already been filed and new actions are being instituted at an average rate of 500 a month. Because it takes 15 to 40 years for asbestos injury to manifest itself, it can be expected that this avalanche of single-matter litigation will continue to mount well into the next century. Asbestos litigation in America has reached truly epidemic proportions.

The enormity of the problem was underscored only two weeks ago when a $210,000 renovation had to be done on a special auditorium in San Francisco to accommodate an asbestos liability trial, or as one newspaper reported under the headline "Asbestos Trial's Size Rivals Conventions." The article reported that lawyers from forty-six firms took lottery-assigned seats for the start of a massive trial to determine who is liable for billions of dollars in asbestos-related injury claims. The article stated that "the trial -- so huge it is being held in a specially renovated auditorium -- could last more than a year."

Mr. Chairman, as one who trains lawyers, I have been convinced that this situation not only is a serious and pressing public problem, but also an embarrassment to the legal profession.

That is why I especially appreciate the opportunity to report to you today that not only have the members of our negotiating group agreed on a formula and mechanism for handling the great bulk of these cases outside the court system, but we have also won agreement from a large enough number of additional producers and insurance companies to assure the establishment and, we believe, success of the new mechanism.

The importance of this historic development to our court system, to claimants, to producers and to the insurance industry is clear. I cite the following dimensions of the critical need by all parties for a solution to this national tragedy.

- The present backlog of asbestos suits in our courts is so extensive that in a city such as Philadelphia, five judges now handle nothing but asbestos cases, fulltime, and they are barely making a dent in the cases waiting to be heard.

- The normal legal procedures for handling these cases is so inefficient and costly throughout the country that claimants with a real and immediate need are forced to

wait years for a decision, which often comes after their deaths. And, according to a study by the Rand Corporation's Institute for Civil Justice, almost two-thirds of judgments or settlements are going for lawyers and legal expenses, with claimants getting only 37 cents on each dollar awarded.

- In the last ten years, Rand estimates, asbestos producers and their insurers have paid approximately $1 billion in compensation and legal expenses -- most of it, as I have said, to lawyers.

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While we have pursued a non-governmental solution -- and have achieved it -- we are indebted to members of Congress, to Secretary of Commerce Malcolm Baldrige and others in government who have supported our efforts. Also, I must admit, the private sector recognized the threat that if it did not produce an equitable solution, sooner or later government would have to intervene and superimpose bureaucracy on an already clogged judicial system -- probably not to the satisfaction of any parties to the problem.

The unique aspect of these cases, in addition to their sheer numbers, is that since exposure may not result in identifiable injury until as long as forty years later, the claimants often are unable to identify the company or companies to whose asbestos products they were exposed. They, therefore, tend to sue every company that has had a history of asbestos involvement. As a result the average suit currently has about twenty defendants and each has its own battery of defense attorneys. Greatly complicating the cases is the fact that the long latency period before injury is manifested raises exceedingly complex questions regarding insurer responsibility -- as in the California case now being tried.

Even when a company is judged blameless it still incurs large legal expense. One company, by way of example, was involved in six trials over a two-month period and, although it was exonerated of responsibility in all six cases, its court and legal fees were unrecoverable.

Moreover, experience has shown that litigation does not provide equitable solutions for those who are injured. Two workers claiming injury resulting from employment in the same shipyard but filing in different jurisdictions can find that one may eventually receive a large award and the other, with equal disability, may receive nothing.

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However, though they had the wisdom to seek a rational solution to their problem, it can fairly be said that at the outset they agreed about little else. With my Yale colleague, Edward Dauer and James Henry, the president of the Center for Public Resources, we set out on our difficult task, to get to know each other and to getting the parties, with their divergent views, to start talking to us and to each other.

Almost miraculously by May, 1984, the Group had resolved its differences and had come to an agreement to establish the Asbestos Claims Facility, with proposed headquarters in Boston and a West Coast office in San Francisco, to handle all of their asbestos claims. To be successful, however, the Facility needed a much broader subscription among producers and insurers.

I am pleased to say that today we have signed up 33 producers and 22 insurers and anticipate that all will convert their conditional subscriptions to a final agreement on May 29.

I do not wish to impose upon the Committee at this time to further describe the horrendous legal problems and differences which had to be overcome to bring us to this point. This undoubtedly will be a subject for management and law school texts in years to come. They may be titled: "Private Management of a Public Problem." Briefly, though, the Facility will:

- Provide plaintiffs with a quicker and more equitable resolution of their claims.

- Overcome compensation inequities by providing a central place to file claims.

- Reduce legal costs for plaintiffs and defendants by encouraging settlement of claims.

- End disputes between producers and insurers over responsibility for insurance coverage by establishing a coverage plan from first exposure through diagnosis of asbestos-related injury.

- Allow producers and insurers to manage their liability and pursue planning for the future.

As such the Facility will meet our stated goals of establishing a mechanism that will encourage and facilitate negotiated settlements; promote fair, consistent and timely resolutions of asbestos-related claims; encourage the resolution of disputes through non-judicial procedures, and encourage waiver of punitive damage claims.

I might add parenthentically that the formula we have developed may well become the prototype for dealing with other major litigation that could burden our courts and involve them in trials lasting not days or weeks, but sometimes years.

It is important that the Asbestos Claims Facility is all voluntary. A plaintiff desiring to litigate through the courts will still be free to go that route, originally or at any time the plaintiff should be dissatisfied with the Facility.

The signatories to the Agreement -- the Facility's members -- however, will refer all claims against them to the Facility for handling. And they will give the Facility authority to evaluate, settle, pay or defend all asbestos-related claims against them. This will greatly simplify procedures and reduce the time required to reach actual pay-out.

Claimants will be required to submit certain standard information, including employment, medical and compensation history. The claimant will have to have been exposed to asbestos-containing products manufactured by one of the Facility's members and have a diagnosed asbestos-related disease.

If a negotiated settlement cannot be reached, the Facility will offer a full range of mediation services. And, if a case cannot be settled by the "Alternate Dispute Resolution" procedure, the Facility will provide for the joint defense of all members, using a single defense team.

The Facility, by the way, will be funded by its members and will be a not-for-profit corporation.

Finally, Mr. Chairman, I again wish to express my appreciation to you for your interest, and to those in government who have provided encouragement. If I may, with your permission, I would read brief excerpts from statements by two government officials who have endorsed our efforts and have lent the weight of their offices to encourage greater industry participation in the Facility. Secretary Baldrige, in a letter, wrote: "Your efforts to generate a solution are clear testimony to the ability of the private sector to resolve major problems that widely affect our society. It is significant that you have done so without requiring the intervention of government .... The Asbestos Claims Facility you have developed is an innovative approach to resolving asbestos-related claims."

Michael J. Horowitz, General Counsel fo the Office of Mangement and Budget and Chairman of the Toxic Torts Compensation Working Group, wrote: "I congratulate all participants in this ground-breaking experiment."

Mr. Henry, President of the Center for Public Resources, last summed up the significance of the development we report today in these words: "As one who is involved in the development of alternatives to the limited resources of courts, my

observation is that both of these developments -- the Asbestos Claims Facility and the process constructed by this coalition of adversaries -- are of momentous importance in dealing with our increasingly complex disputes. These lawyers and executives have achieved a breakthrough in dealing with the rising costs and delay of litigation. The proposed Asbestos Claims Facility is without precedent and offers a means to resolve other forms of multi-party complex disputes."

I agree with Mr. Henry, and it is my firm belief that the Facility holds promise for dealing with similar problems involving massive litigation in the future.

Again, I appreciate the opportunity to appear before this distinguished Committee to report success on an undertaking which we and, I am sure, many others, often doubted could be brought to this happy conclusion.

Those who have made it possible by becoming signatories to the provisional agreement, which will be completed with the signing on May 29, are identified in a list which I attach to my testimony.

Thank you.

CONDITIONAL PRODUCER SIGN-UPS

A C and S, Inc.
Amatex Corporation
Armstrong World Industries, Inc.
Brinco Mining, Ltd.
The Celotex Corporation
Certain-Teed Corporation
Dana Corp.
Eagle-Picher Industries, Inc.
Eastern Refractories Co., Inc.
Fibreboard Corporation
The Flintkote Company
Forty-Eight Insulations, Inc.
The Keene Corporation
Lac D'Amiant du Quebec, Ltd.
Manville Corporation
Maremont Corporation
National Gypsum
National Service Industries, Inc.
Nuclear Environmental Protection, Inc.
Owens-Corning Fiberglas Corporation
Owens-Illinois, Inc.
PACOR, Inc.
Pittsburgh-Corning Corporation
Porter Hayden Corporation
Rock Wool Manufacturing Company, Inc.
Shook & Fletcher Insulation Company
Turner & Newall
Confidental (6)

CONDITIONAL INSURER SIGN-UPS

Aetna Life & Casualty
American Universal
Argonaut
Bituminous Casualty Company
Continental Casualty (CNA)
Continental Insurance
Crum & Forster
Employers of Wausau
Fireman's Fund
First State Insurance Company
Harbor Insurance Company
Hartford Insurance Group
Highlands Insurance Company
Home Insurance
INA
Liberty Mutual Insurance Company
Lloyds of London and London Companies
Reliance Insurance Company
Royal Insurance Company
St. Paul Insurance
U. S. Fidelity & Guaranty Company
Zurich Insurance Company

Senator NICKLES. I have several questions along the same line of Senator Metzenbaum's. He has other commitments as well, and I will be happy, Senator, to let you ask some questions. However, before you begin the questions Senator, I want to compliment you Dean Wellington, for your interest and willingness to take on what many would say is an insurmountable task, one that has a lot more questions than solutions.

You have come up with a possible solution and, again, I compliment you on it. Senator Metzenbaum is going to ask you how it would work. I was going to ask you a few other questions, first about the percentage of participation, and so on.

Senator, go ahead and ask your questions, then I will follow up.

Senator METZENBAUM. They are directly to the point, and that is I have a claim; the Facility is working. What do I do?

Dean WELLINGTON. The claim would be brought to the Facility and it would be evaluated. I take it that we are assuming we have a claimant who has been injured by asbestos exposure to a product of one or more of the subscribing members of the Facility—subscribing producers—it is a genuine claim and it can be established that, there has been injury.

Senator METZENBAUM. It takes some time to establish it.

Dean WELLINGTON. It may take some time to establish it, that is correct.

Senator METZENBAUM. The statute is running?

Dean WELLINGTON. The statute is tolled when the claim is filed with the Facility.

Senator METZENBAUM. The statute is tolled when the claim is filed, and that is by some written undertaking or oral statement?

Dean WELLINGTON. Well, it would be some event that would accomplish the result sought.

Senator METZENBAUM. Well, I guess I am not quite satisfied with that answer.

Dean WELLINGTON. Well, I would be more specific if I could be, but the Facility is not in being and we do not——

Senator METZENBAUM. It is not yet in being?

Dean WELLINGTON. It is not yet in being.

Senator NICKLES. Let me ask a couple of questions first, if the Senator would not mind.

Senator METZENBAUM. Go ahead.

Senator NICKLES. What is your schedule for the Facility at this point?

Dean WELLINGTON. We hope to have completed the subscription in its final form by the 29th of May.

Senator NICKLES. By the 29th of May of this year?

Dean WELLINGTON. Yes.

Senator NICKLES. Do you have all you need in terms of producer and insurer subscribers to make the Facility work?

Dean WELLINGTON. Senator, I do not mean to be evasive. I am optimistic that we do, but I cannot say for sure that we do.

I could elaborate on that a little bit. What is going on now is the production of insurance schedules by the subscribing producers, and that has not been concluded.

Senator METZENBAUM. What kind of schedules are those?

Dean WELLINGTON. Schedules of insurance coverage, going back, as we say, because——

Senator METZENBAUM. Between the producers and the insurance companies?

Dean WELLINGTON. Right. And until that is done and until people can sit down and agree on it and what the coverage is, it is very hard to answer Senator NICKLES. But as I say, everyone in the process is extremely optimistic that we will be able to complete our signing by the 29th of May.

Senator NICKLES. From a liability standpoint, what percentage do the conditionally signed producers and insurers represent?

Dean WELLINGTON. Well, in part, we will not know that until after the 29th.

Senator NICKLES. If all the conditional subscriptions did sign the agreement on the 29th, do you have a——

Dean WELLINGTON. I do not think I have an answer to that. It would be very substantial.

Senator NICKLES. Very substantial. Is that 70 percent?

Dean WELLINGTON. I am reluctant to put a figure on it because I do not know the answer.

Senator METZENBAUM. I represent a client who worked for Celotex, Johns Manville and one other company, and two of them are parties and the third is not. I assert my claim. Those that are covered—how do we toll the statute? Is there some agreement entered into with counsel for the plaintiff?

Do you assume that many of the cases will not have counsel representing them? If the statute is tolled in connection with the two companies, how do you handle the problem of the third company that is not a party to it and toll the statute in connection with that one?

Dean WELLINGTON. You raise interesting details, Senator Metzenbaum, but I have been addressing, and the participants have been addressing, problems of a different magnitude, if I may say so.

Senator METZENBAUM. A different——

Dean WELLINGTON. Magnitude; that is, how do we resolve the major disagreements that exist between insurance companies and their policyholders over who is responsible for what, so that money can be made available for claimants.

I say that that is a problem of a different magnitude because we are talking about billions of dollars.

Senator METZENBAUM. I understand, I understand.

Dean WELLINGTON. And the technicalities of the insurance problems are enormous. They are complex, they are intellectually exciting, but they are practically very, very important if we are to manage in a better way than we have been managing—and I do not mean to say that we will solve, but we will manage in a better way this national disaster of asbestos injury.

Now, the questions you are asking me are questions that I really have not been engaged in addressing. They are questions that will be addressed by the Facility's board of directors, that will be addressed by the Facility's counsel, and I am confident that they will be resolved in ways that will be fair because—and this is an enormously important factor to keep in mind—this Facility has to perform fairly because if it does not, it will be ignored.

And as you said in your opening remarks and as I say in my prepared statement, it will be ignored because there exists a tort system which will validate what we do. If we do not behave fairly, if this Facility does not operate in a way that is perceived as fair and that is fair, it will not be used.

The tort system will be used and the Facility will fail, and nobody wants that.

Senator METZENBAUM. Is it fair——

Senator NICKLES. Might I interrupt. Just to be sure at that point—if a claimant is not satisfied or does not want to use the facility, he still has the court system to go through?

Dean WELLINGTON. Absolutely. Perhaps if our group had the power to do otherwise, we would have, but we do not have that power. We cannot legislate. We cannot take away a right to a jury trial. I do not know whether you can legislate away a right to a jury trial, but we certainly do not have that authority.

We are dealing within an existing system, and what we have tried to do is make that existing system work more efficiently. We have developed alternative dispute resolution mechanisms which ought to be appealing, which will be more rapid, which ought to make it unnecessary in the bulk of situations to litigate.

But if they are not satisfactory, litigation remains as an alternative.

Senator NICKLES. They always have that as an alternative?

Dean WELLINGTON. They always have that, unless they voluntarily select binding ADR, such as binding arbitration. In that case, it is binding and subject to judicial review in the way, say, that labor arbitration would be.

Senator METZENBAUM. Would you define ADR?

Dean WELLINGTON. Alternative dispute resolution, but arbitration is probably the approach that would be used.

Senator METZENBAUM. You have been in Washington too long. You start using these ADR's and stuff.

Dean WELLINGTON. I am sorry about that; I apologize. I am leaving this afternoon, Senator. [Laughter.]

Senator NICKLES. Dean, what would you say the major advantages are of the Facility versus tort litigation as of today?

Dean WELLINGTON. Well, it is enormously more cost effective. Consider the fact that, according to the Rand study, the average number of defendants' lawyers, lawyers representing the producers who are the defendants in the underlying product liability cases, is 20.

What the Facility does is aggregate the defense, and the Facility can be represented by one lawyer. Now, we all know what lawyers charge. In my judgment as an academic, I think they charge too much.

Senator METZENBAUM. Say it a little louder. [Laughter.]

Dean WELLINGTON. But that happens to be for another committee, perhaps.

Whether they charge too much or not, 20 teams of lawyers—not 20 lawyers, but 20 teams of lawyers—in one law suit are an obscenity.

Senator METZENBAUM. I would agree.

Dean WELLINGTON. OK. One team is not, but, under the existing tort system, you need 20 because their clients' interests are in conflict.

Senator METZENBAUM. What you are really doing, as I see it—and correct me if I am wrong—the Wellington result is to provide a mechanism for the insurance companies and the covered companies to work together as a group and, as I understand what you are saying, not necessarily to cut down the amount of the awards or the settlement amount, but to cut down the tremendous expenses involved by the insurance companies and the covered companies and the duplication of effort in defending those cases.

Is that a fair statement or do you see—and I am trying to say I am as concerned about the plaintiff's rights, and I gather what you are saying is that there is no effort to deny the plaintiff any rights.

Dean WELLINGTON. There is no effort to deny the plaintiff. We cannot deny the plaintiff even if we wanted to, and I certainly would not be a party to denying the plaintiffs. There is more to it, though, to Senator Nickles' question. Point one is the reduction in legal expenses even if you litigate.

It is also the case that litigation ought not to be necessary if you can resolve it within the Facility.

Senator METZENBAUM. I understand, if you can resolve who pays what.

Dean WELLINGTON. And that will reduce costs even more.

Another factor to be taken account of is that it should be uniform because there is a facility, rather than numerous jurisdictions in which lawsuits might be tried with differing results. So you should have uniform results, which seems to me to be a condition of fairness in the handling of this problem.

Senator METZENBAUM. Let us stop at that for a minute. The awards for a particular kind of disability for a man of a particular age are running—and I am making this up—$3 million in New York and about $300,000 in Albuquerque, NM. Therefore, in order to get some uniformity, it is agreed that everybody ought to get $750,000.

Now, I do not see how this procedure is going to keep the lawyer from New York or his client or her client from wanting to litigate that action in New York. I am just curious as to how you think uniformity is going to help because any lawyer worth his salt is going to say, well, that is all right if you live in a small community, but it is not all right if you live in Miami, FL.

Dean WELLINGTON. I do not think the premise is correct, Senator, if I may say so. I do not believe that the lack of uniformity that currently exists only has to do with the fact that one suit is in New Mexico and another is in New York, but rather it has to do with the nature of jury trials.

Senator METZENBAUM. Of jury what?

Dean WELLINGTON. Of jury trials, the nature of litigation. It could be within the same jurisdiction. It may be that one of the problems that the Facility will have to confront is the problem that in certain jurisdictions, it is more desirable from the claimant's point of view to sue than in others. We will see.

I cannot anticipate how that will articulate on the way in which the Facility functions. It is difficult. I do not have all the answers.

We do not have the Facility yet. We do have a settlement agreement and we do have a plan and we do have committees that are working.

There are, it does seem to me, additional advantages with this that are also cost-saving advantages. The cost of time—-the use of the Facility surely should reduce the length of time in which a legitimate claimant who has been injured receives compensation for that injury.

It can take years and years, as we know, and, very sadly, sometimes claimants die before their case is resolved. So reducing time is a major factor in this and a major advantage, it seems to me, of our approach.

There may be others. It certainly will have a social advantage, public advantage, an advantage that I know everyone in government is concerned with, and that is the burden on courts. To move this into a private facility for resolution has to be beneficial in that it will reduce the amount of business before the courts.

It will relieve those judges that I mentioned in Philadelphia who are spending all of their time on asbestos litigation and allow them to address other kinds of issues.

Senator NICKLES. Dean Wellington, you said that the sign-up deadline is May 29. When would the facility be ready to hear the first case?

Dean WELLINGTON. I cannot answer that. One of the things that the Facility would not want to do is to start processing cases before it could process cases fairly, and that means that it has to be clear that it has everything in place so that it can proceed effectively.

I should say that there are a number of committees that are working in anticipation of the final settlement, and that my expectation is that that work will proceed, so that after May 29, we can move very, very rapidly.

Senator NICKLES. We mentioned earlier that a claimant does not have to use the facility if he elects not to.

Dean WELLINGTON. Right.

Senator NICKLES. What happens if a claimant uses the facility, but he is just not happy with the settlement? Is there an appeals process set up?

Dean WELLINGTON. Well, if the claimant is not happy with the settlement, the claimant is free then to go into the tort system, unless the settlement was, by the claimant's agreement, a binding settlement.

Senator METZENBAUM. Is it contemplated that this group would go to claimants directly and try to get them to sign for binding arbitration?

Dean WELLINGTON. While I have described this as a private administrative agency, and I think that is an accurate description, I do not think that it ought to be seen as going out and drumming up business. It will receive claims.

There is no way in which the Facility can pressure a claimant into going to binding arbitration. There are advantages to binding arbitration in this sort of process even as there are, Senator Metzenbaum, in the labor field.

Senator METZENBAUM. Tell me this: Have you heard of any general rules that they contemplate setting up with respect to the han-

dling of claims such as that claims, just for plural thickening, will not be included or considered, or something of that kind? Has that been discussed?

Dean WELLINGTON. There have been inconclusive discussions with lawyers representing claimants. It may be helpful to you in understanding what we have been up to for me to say that when we began, we began as a tripartite group. What has come to be known as the Wellington Group—not the Wellington Resolution Group, but the Wellington Group—was a tripartite effort.

Plaintiffs' lawyers heavily involved in asbestos litigation were involved in our process and we had plenary sessions over a period of a couple of months with plaintiffs' lawyers present.

It became absolutely clear to us at a relatively early stage that if we were to have this private administrative agency, to have this Asbestos Claims Facility that was to operate in a fair fashion and reduce costs and eliminate congestion in the court system, the first thing that had to be done was to have a solution to these very difficult insurance problems as to covers of triggerage, duty to defend, all of the problems that are being litigated in this California case.

Those are problems that the plaintiffs understood had to be addressed by the insurers and the producers. During the course of meetings between the insurers and the producers, I frequently saw plaintiffs' lawyers and from time to time we had, once again, plenary sessions with plaintiffs' lawyers.

I continue to be in touch with lawyers who represent claimants. I think that they are, as I would be were I they, skeptical about the Facility. On the other hand, I do not believe—and public statements that have been made by a number of them lead me to think that this is the case—I do not believe that they are pessimistic or antagonistic or hostile in any way.

We have not yet developed the procedures for the Facility that you want me to discuss, and therefore I cannot. Those procedures will be developed. Alternative dispute mechanisms will be established in consultation with plaintiffs' lawyers.

Senator METZENBAUM. One last question, then I am going to have to leave the meeting. Do you see any antitrust aspects to this?

Dean WELLINGTON. I do not believe so. We are involved, after all, in settlements of disputes. I do not see why what we are up to and have been up to is any more likely to raise antitrust problems than other kinds of settlement procedures.

Senator METZENBAUM. I did not think so on its face, but I figured, hell, you teach the law; I just work at making it, so I would get your professional opinion.

Thank you very much.

Dean WELLINGTON. You are very welcome, Senator.

Senator NICKLES. Senator Metzenbaum, we appreciate your participation and I look forward to working with you on this difficult issue. Thank you.

Dean Wellington, I appreciate your cooperation before the committee as well. Again, I congratulate you as the leader of the Wellington Group. Undertaking this enormous task is not an easy one and I compliment you on the progress made.

I will submit additional questions to you for the record. Some of the questions Senator Metzenbaum and I asked that have not been

answered can be answered, certainly, by the end of the sign-up period, and that is of interest to everybody.

Again, I look forward to working with you.

Dean WELLINGTON. Thank you very much, Mr. Chairman.

Senator NICKLES. Thank you. We also have questions from Senator Kennedy for the record.

[The following were received for the record:]

July 12, 1985

RESPONSES OF DEAN WELLINGTON TO QUESTIONS SUBMITTED BY SENATOR NICKLES

1. Do you have a sufficient number of Producer and Insurer subscribers to make the Facility work?

ANSWER: We believe that there is a sufficiently critical mass of Producers and their Insurers to enable the Facility to provide a viable, effective alternative to the tort system. While some Producers and Insurers have declined to participate at this time, a significant number of Producers and Insurers are participating, which should make dealing with the Facility more effective and attractive from the claimants' standpoint. Moreover, we are hopeful that additional Producers and Insurers will apply to participate in the Facility in the future.

2. How will the Facility claims handling process work, and what recourse does a claimant have if he is not satisfied with the Facility?

ANSWER: In order to be eligible for Facility claims handling, a claimant simply needs to show that he or she has an asbestos-related condition and was exposed to the asbestos or asbestos-containing products of a Facility subscriber. Once a claimant is found eligible, the claim will be evaluated, and the Facility will make an offer to the claimant. If the claimant does not have an asbestos-related impairment or dysfunction, the Facility will agree to toll any applicable statutes of limitations so that a claimant will not be forced to take his or her chances in the tort system. If an asbestos-related impairment or dysfunction later should occur, the claimant will be able to return to the Facility to receive an offer.

If a claimant is not satisfied with the Facility's offer, the Facility will provide, at no cost to the claimant, a full range of mediational techniques to attempt to reach an accord. At any time throughout this process, the claimant has the right to return to the tort system. Where the Facility and claimant cannot agree finally on a settlement, the claimant will have the right to elect either to return to the tort system or to use a process of binding alternative dispute resolution, which will involve independent third parties. Given the reasonable

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threshold eligibility requirements, the full-ranging claims handling process (the cost of which is borne entirely by the Facility), the ability of claimants without impairment or dysfunction to return subsequently for reasonable compensation, and the ability of a claimant at any time prior to election of binding alternative dispute resolution to return to the tort system, we believe that the Facility will provide significant safeguards and incentives to claimants to make it successful.

3. To what extent have claimants and trial attorneys been involved in the actual negotiations that have led to the Agreement to establish the Asbestos Claims Facility?

ANSWER: The Agreement itself, which provides for the resolution of the global controversy between Producers and their Insurers over the application of insurance to these claims and which establishes the Facility, is the result of nearly three years of negotiation between the Producers and their Insurers. While representatives of the Producer and Insurer negotiators have met with claimants' representatives at intervals throughout this period, the insurance coverage issues, which determine the manner of funding these claims and the ultimate viability of the Facility, needed to be addressed first. Now that that has been accomplished, we will be meeting further with representatives of claimants as we attempt to implement the Agreement and make the Facility operational. Representatives of the claimants have been interested and, I believe, constructive throughout the negotiation process, and I hope that they will be supportive of this endeavor.

4. What is the schedule for the Facility from this point forward?

ANSWER: Now that the Agreement has been finalized, and we have a critical mass of Subscribing Producers and Insurers, the parties are moving forward as expeditiously as possible to open the Facility. At this point, the Facility has been incorporated, the Chief Executive Officer has been chosen, site selection is under way, the Board of Directors shortly will be appointed, complex computer systems are being developed and a system of interim claims handling soon should be implemented. While the Facility will not be fully operational prior to early 1986, we hope to begin handling claims by the fall of this year.

June 5, 1985

RESPONSES OF DEAN WELLINGTON
TO QUESTIONS SUBMITTED BY SENATOR EDWARD M. KENNEDY

1. I understand that all participants currently are conditional subscribers to the accord. Are the conditions identical in each case? If not, how long will it take to resolve all differences (or enough of the differences to proceed with the implementation of a Claims Facility)?

ANSWER: My understanding is that the conditions are not identical in each case, although the participation by all subscribers is conditioned upon the completion of all necessary documentation and a sufficient number of subscribing Producers and subscribing Insurers. We expect that the legitimate concerns of all conditional subscribers will be satisfied sufficiently to enable them to sign the Agreement on the scheduled closing date.

2. It has been reported that insurance industry participation in the Claims Facility is contingent upon acceptance of the Agreement's terms by the reinsurance community. Do you have those assurances today? What will happen if you do not obtain those assurances by May 29?

ANSWER: Insurance industry participants certainly are seeking the support of their reinsurers concerning the Wellington Agreement. While the dialogue between direct insurers and their reinsurers is continuing, we are optimistic that those insurers who have conditionally subscribed will be able to sign the Agreement on the scheduled closing date.

3. Under the Wellington Agreement, what happens when the insured party wishes to join the Facility but its insurance carrier does not (or vice versa)?

ANSWER: The Agreement permits participation by every Producer and Insurer that signs it on the closing date, irrespective of any other Producer's or Insurer's participation.

4. I understand that the Wellington Agreement does not presently encompass a system for resolving property damage claims.

- o Is this likely to be reconsidered?
- o Are there obstacles to including such claims? Please specify.

ANSWER: The Wellington Agreement deals solely with asbestos-related bodily injury claims. During the course of the negotiation of the Agreement, consideration was given to the property damage issue and it was determined to focus efforts on resolving the bodily injury issue first. A committee of Producers and Insurers presently is reevaluating the property damage issue: key questions that would require resolution include finding a mutually agreeable basis for sharing of potential Producer liabilities and resolution of the controversy over the application of insurance to these types of cases.

5. I understand that personal injury claims and property damage claims are generally both payable under the same policy of insurance and oftentimes under the same policy limits. If that is so, how will property claimants (such as schools) be compensated once insurance limits are reached? Are there enough resources -- insurance dollars plus insured assets -- to pay all types of claims in full?

ANSWER: My understanding is that personal injury claims and property damage claims generally are payable under the same policy, and whether both types of claims are payable under the same policy limits will depend upon the particular insurance policy in question. Under many such insurance policies the costs of defense also count against the same policy limits. It is our expectation that by dramatically reducing defense costs, more policy proceeds will be made available for payment of claims, be they personal injury or property.

6. The Facility will undertake settlement discussions and/or arbitration proceedings of individual claims. At what stage does the claimant's participation at the Facility become an irrevocable election of remedy?

What is the evidentiary status of materials developed prior to such election in a subsequent tort action? In your view, what is the legal status of the private arbitration decision in a subsequent tort action?

ANSWER: Following a process of negotiation, and possibly non-binding mediation, a claimant who cannot agree with the Facility on appropriate compensation will have the right to proceed to binding alternative dispute resolution or back to the tort system. The plaintiff's election at this point becomes irrevocable. The evidentiary status of materials developed during the Facility process as well as the legal status of that process in a subsequent tort action would necessarily depend upon the particular state law in question.

7. What percentage of asbestos cases pending today represents claimants with pleural placques or pleural thickening, but minimal or no disability? How much compensation is the Facility prepared to offer these claimants?

ANSWER: Although I do not know what the percentage breakdown is, I understand that a number of claimants who may have an asbestos-related condition but no physical impairment or disability are forced to pursue actions in the tort system in order to preserve their rights under applicable state statutes of limitations. The Facility would attempt to remedy this situation by tolling the applicable statutes of limitations for such individuals who have an asbestos-related condition as a result of exposure to the products of one or more members of the Facility. The Facility then would agree to provide compensation to such claimants if such a condition were to develop so as to present a situation of physical impairment or disability. We believe that this approach will result in equitable compensation of injured claimants and reduce the overcrowded docket of the court system.

8. What kinds and what levels of compensation will the Facility provide to claimants generally? Is there a predetermined maximum amount, either officially or unofficially? Will payment vary by disease type?

ANSWER: The Facility will not use a predetermined schedule of benefits. Rather, each claim will be evaluated on its individual merits, and the claimant's recourse to the tort system should serve to ensure the fairness of such awards.

9. What do you estimate the total cost per case to be under the Claims Facility? How many asbestos claimants do you believe there will be over the next 20 years or so?

- Based on the above, will the Claims Facility remain viable once insurance coverage begins to run dry?

ANSWER: I am unable to provide you with a meaningful estimate at this time of the total cost per case in the Facility or of the number of asbestos claimants that there are likely to be over the next several decades. I can say that as of this date approximately 30,000 asbestos-related claims have been filed, and more than 500 cases are docketed each month. Some knowledgeable individuals believe that total claims will be in the neighborhood of 60,000; others place the total figure higher. Similarly, I am not in a position to provide you with an answer as to whether the Facility will remain viable in the event that the insurance coverage of Producers is used up. Given the nature of the agreement between Producers and Insurers to make a significant amount of insurance coverage available, to reduce dramatically the costs associated with handling asbestos-related claims and to provide the benefits of this to claimants, I am not sure that the assumption in your question, that is, that Producers' insurance will begin to run dry, is correct.

10. I would like you to evaluate the impact you think the Agreement is likely to have on courtroom dockets.

- What percentage of plaintiffs do you expect to file a claim with the Facility?

- What percentage of claims do you believe will "exit" back to the courtroom?

- What incentive is there for a minimally disabled worker to use the Facility -- isn't he likely to recover more from a jury? Similarly, what incentive does the mesothelioma victim have to file a claim with the Facility and not exit to a jury trial?

ANSWER: I believe that most claimants will take advantage of the virtually cost-free alternative that the Facility offers and file their claims with it. Although

I would expect that the Facility's initially handling of claims would be subject to some trial and error, the claims handling system being developed should actually result in a minimal amount of "exits" back to the court-room. A minimally disabled worker or a claimant with mesothelioma will have two major incentives to use the Facility rather than resort to the courts: (1) Facility claims handling will be far more expeditious than the tort system; and (2) Facility awards will be more predictable and fair than the average award subject to the vagaries of the tort system.

11. What assurances, if any, do you now have regarding the plaintiffs' bar commitment to use the Facility? What discussions have you held with plaintiffs' attorneys towards this end?

- o Has the issue of contingency fees been raised in these discussions? Is it your intent to pay such fees through the Facility, or will the injured worker bear those costs?

ANSWER: Various members of the plaintiffs' bar have expressed interest in the Facility, and some already have indicated their desire to bring their pending cases to the Facility. My firm belief is that the plaintiffs' bar will support the Facility. Since the beginning of our effort in the fall of 1982, discussions have been held between representatives of Insurers, Producers and members of the plaintiffs' bar. These discussions will continue, and I expect that once the insurance coverage issues have been put to bed with the signing of the Agreement, discussions with representatives of the claimants will be more frequent. The issue of contingent fees has not been raised in our discussions, as we believe this to be a matter between an individual claimant and his attorney. I would hope that if the Facility is successful in streamlining the claims handling process, the contingent fee percentages will decrease.

12. Will each claim be processed separately or will attorneys who represent several claimants negotiate settlements in blocks?

ANSWER: Although claims may be settled simultaneously, each claim will be evaluated on its own merits.

13. Press reports indicate that eight companies have conditionally subscribed to the Agreement but do not wish to be identified. Why is that?

ANSWER: I do not know why certain companies have requested anonymity.

14. Explain the producers' cost-sharing formula you have devised. What is the formula based on?

ANSWER: The Producers' cost-sharing formula apportions to each Producer a share of liability payments and defense costs, if any, for each claim handled by the Facility. Once apportioned to the Producer, such payments and costs are to be paid by the Producer's available insurance coverage. The Producer's approtioned percentage shares are determined by an independent consultant, on a confidential basis, under a sophisticated formula that looks at the Producer's historical litigation experience.

15. What are estimated annual costs to start up and operate the Claims Facility? How much will be paid out in year one? Year two?

ANSWER: I am informed that the estimated annual operating cost of the Facility will be in the neighborhood of $12 million. Because there is no predetermined schedule of benefits and each claim will be evaluated individually on its merits, I am not in a position to provide you with an annual estimate of the amounts likely to be paid to claimants. With respect to start-up costs, I know that in negotiating the Agreement to this point and developing the Facility processes and systems, Producers and Insurers collectively have spent in excess of several million dollars.

16. Is the compensation to be paid by the Facility subject to an employers' workers' compensation lien?

ANSWER: I do not know whether compensation paid by the Facility will be subject to employers/workers compensation liens.

17. Three asbestos manufacturers -- UNR, Manville and Amatex -- are presently in the middle of Chapter 11 reorganization proceedings. In each case, asbestos liabilities seem to be a major factor in the decision to file for bankruptcy protection.

- o Are any or all of these companies conditional subscribers to your Agreement?

- o Are there any unique problems in trying to deal with these subscribers on the Agreement?

ANSWER: At this time, Manville and Amatex are conditional subscribers to the Facility. Because such companies in the midst of a reorganization proceeding are likely to be unable to execute the Agreement finally on June 19, there is a special provision in the Agreement providing these companies, upon the satisfaction of certain conditions, with a safe harbor until December 31, 1986, to participate.

Senator NICKLES. Our next panel consists of John Baldwin, who is president of Pittsburgh-Corning, Pittsburgh, PA; DeRoy Thomas, who is chairman of the Hartford Insurance Group, from Hartford, CT; and Robin Jackson, who is the chairman of the Asbestos Working Party, Lloyds of London.

Gentlemen, we welcome you before the committee. Mr. Baldwin.

STATEMENT OF JOHN L. BALDWIN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, PITTSBURGH-CORNING CORP., PITTSBURGH, PA; DEROY THOMAS, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, HARTFORD INSURANCE GROUP, HARTFORD, CT; AND ROBIN A.G. JACKSON, CHAIRMAN, LONDON ASBESTOS WORKING PARTY, LONDON, ENGLAND

Mr. BALDWIN. Good morning, Mr. Chairman. My name is John L. Baldwin. I am the president and chief executive officer of Pittsburgh-Corning Corp. I testify today as chairman of the producers negotiating team within the Wellington Resolution Group.

I very much appreciate the opportunity to appear before this subcommittee again, Mr. Chairman, and, before proceeding, would like to express my gratitude to you and your staff for your continuing concern over the amounting national crisis posed by asbestos injury litigation.

Certainly, Harry Wellington and the exchange with Senator Metzenbaum has highlighted the problem facing our courts, and I cannot say anything more than I heartily agree with that. Mr. Chairman, as you mentioned earlier, I did testify before this committee as one of the many people that you enumerated that had testified the last time.

At that time, there were more than 20,000 lawsuits that had been filed by claimants seeking compensation for alleged injury from workplace exposure to asbestos. Three producers had already been driven into bankruptcy by the overwhelming number of claims, and lawyers on both sides, as was mentioned this morning, and not the injured workers, were pocketing the majority of the dollars being paid by our companies.

Litigation was costing us and our insurers substantial sums even when we were found blameless. But most difficult of all from my standpoint as a businessman, we found ourselves—and I speak for the industry—we found ourselves no longer in the business of running our companies, but rather in the business of asbestos litigation.

Today, I am really pleased to report that substantial progress has been made in dealing with this crisis. The Asbestos Claims Facility will become a reality, in my judgment. The final signing date is May 29, as has been stated earlier.

This claims facility is really a milestone. A claimant can come in. As soon as he comes in, his statute is tolled by all of the participants in the claims facility, whether the man was exposed to his material or not.

I think Dean Wellington talked about the savings in defense costs which could go to claimants, but I view it in another fashion, in that the Facility will allow prompt and equitable payments.

No longer does a claimant have to go through the crap shoot in the courts, but rather can go to one central place and have his claim dealt with in a fair, prompt and equitable fashion.

The question was earlier raised about disability and the extent of disability, and so forth, and I would like to expand on that. Our intention is now and always has been, and will be, that we want to compensate those people who are truly disabled, that cannot work, that have a disfunction, an impairment.

Those people that have been exposed to asbestos and have some evidence on x rays that there has been some exposure, but are able to work, are able to live a normal lifestyle—in the case of those people, they would be given what we have euphemistically called a yellow ticket, so that if indeed said claimant ever became sick in the future, he could come back into the Facility and then make a claim and get a prompt and fair payment.

I would like to say a few words about my company. We are in the speciality glass business. We are a very small company, with about 650 employees. We were incorporated in 1937. In all those years, with the exception of the period between 1962 and 1972, we manufactured nonasbestos building materials.

But during that 10-year period that I mentioned, the company did manufacture and sell approximately $21 million worth of an asbestos-containing type insulation, mostly under military and other Federal specifications and orders.

Yet, while we have not manufactured that material with asbestos for more than 12 years, we now have about 22,000 lawsuits, which is a staggering problem for a small company like ours.

The truth is that asbestos litigation represents not only a personal disaster for thousands of injured workers, but it is really an economic calamity for defendant companies and their employees.

In all honesty, the industry's involvement and that of the injured workers is primarily related to work done under Government specifications in naval or Federal contract shipyards—work where the Government has been an equal partner with industry in at least half of all the pending cases.

It is interesting to note that the Justice Department currently employs some 30 asbestos litigation lawyers, and estimates have been made that it will spend as much as $10 million on litigation in 1985.

Asbestos litigation is a burden on our companies. It devours management time and financial resources. It hurts our productivity; it hampers our ability to create jobs. It tarnishes our image in efforts to encourage public investment. It affects our credit record and our ability to deal with potential lenders. In short, it stifles our ability to reinvest in America.

Yet, Mr. Chairman, although our companies presently are faced with this massive management and financial burden, it is the claimants who stand to lose the most down the road, for if the resources to compensate the claimants are depleted, who then will pay the claims?

As you know, Mr. Chairman, I have a full text which has been submitted to the committee. In the interests of time, which you requested earlier, and the fact that some of my testimony has already been covered, I would like to just close this by saying a few

things about the Asbestos Claims Facility from the businessman's viewpoint.

We do have a final agreement which will go into effect on May 29. It is an agreement that provides a much higher level of certainty for both producers and insurers than the current situation, and it allows us to devote our energies where we want them to be, seeing to it that the truly injured workers are compensated in a timely and equitable fashion.

I regret that Senator Metzenbaum had to leave, and I understand that, but I know that he views it as important that of the signatories to the preliminary agreement, there are four large Ohio-based companies that are participants in the Wellington agreement.

I want to close by taking the opportunity to commend the Aetna Insurance Co.s Jack Shea, my counterpart, who headed the insurers negotiating group. Jack was not only an outstanding lawyer, but a gentleman as well, and it was a privilege to work with him in hammering out this agreement over the last 2½ years.

We are also indebted to the extraordinary leadership that Dean Wellington brought to bear on this problem, and to the cooperative spirit of both producers and insurers every step of the way.

Hopefully, we can get back to productive business. We can plan our future in the sense that the dimensions of our liability will now be known. So, for us as manufacturers and former manufacturers, for our employees, our shareholders, the economy of the United States, and most of all for the injured workers, we really think this agreement is an important milestone.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Baldwin follows:]

TESTIMONY OF JOHN L. BALDWIN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, PITTSBURGH-CORNING CORP.

Mr. Chairman and members of the Subcommittee.

My name is John L. Baldwin. I am president and chief executive officer of Pittsburgh-Corning Corporation. I testify today as chairman of the producers' negotiating team within the Wellington Resolution Group.

I appreciate the opportunity to appear before this Subcommittee again, and before proceeding would like to express my gratitude to you and your staff for your continuing concern over the mounting national crisis posed by asbestos injury litigation.

The director of the Rand Corporation's Institute for Civil Justice has said that "the resolution of disputes regarding asbestos-related disease has become one of the critical problems facing the American civil justice system."

Mr. Chairman, I could not agree more. Eleven months have passed since I last testified before this Subcommittee.

- At that time, more than 20,000 lawsuits had been filed by claimants seeking compensation for alleged injury from workplace exposure to asbestos.

- Three producers already had been driven to bankruptcy by the overwhelming number of claims against them.

- Lawyers -- not injured workers -- were pocketing the majority of the dollars being paid by our companies.

- Litigation was costing us and our insurers substantial sums even when we were found blameless.

- But, most difficult of all, from my personal viewpoint, we found ourselves no longer in the business of running our company but in the business of asbestos litigation.

Today, I am pleased to report that substantial progress in dealing with this crisis has been made.

As Dean Wellington said, after two years of highly complex and intense negotiations between asbestos producers and insurers, we believe that the fruits of our labor will unfold on May 29 when we sign the final agreement to establish the Asbestos Claims Facility. We believe the Facility represents a private solution that will go a long way in lifting this asbestos compensation albatross from the injured workers, the courts, our companies and the American public.

Companies and Injured Workers Burdened by Asbestos Litigation

Pittsburgh Corning is in the specialty glass business, manufacturing and distributing cellular glass insulation and glass building block. We are a small company employing only about 650 people.

Since our incorporation in 1937, Pittsburgh-Corning has manufactured non-asbestos building materials. However, between 1962 and 1972 we also made a thermal pipe insulation product containing asbestos. During that period the company manufactured and sold approximately $21.7 million worth of this asbestos pipe insulation, mostly under military and other federal specifications and orders.

And yet while we have not manufactured asbestos-containing materials for more than 12 years, we now face about 22,000 lawsuits. This is a staggering problem for a small company like ours.

The truth is that asbestos litigation represents not only a personal disaster for thousands of asbestos-injured workers, but an economic calamity for defendant companies and their employees. And, in all honesty, our involvement and that of the injured workers -- is primarily related to work done under government specifications in naval or federal contract shipyards -- work where the government has been an equal partner with industry in at least half of all the pending asbestos cases. Yet, the Justice Department currently employs some 30 asbestos litigation lawyers and estimates it will spend as much as $10 million in 1985 on asbestos litigation expenses.

There is no question that asbestos litigation poses a tremendous burden on our companies. It devours management time and financial resources; it hurts our productivity; it hampers our ability to create jobs; it tarnishes our image and efforts to encourage public investment; it affects our credit record and ability to deal with potential lenders; in short, it stifles our ability to reinvest in America.

Mr. Chairman, although our companies presently are faced with this massive management and financial burden, it is the claimants who stand to lose the most down the road. For if the resources to compensate the claimants are depleted, who then will pay the claims?

Steps Toward a Lasting Solution

Faced with this stark reality, 16 producer companies and 12 insurers joined together over two years ago in an effort to stop this litigation roller coaster and get back to the business of doing business.

We wanted to find a lasting solution for peace and cooperation between our two groups. All agreed that until the disputes between producers and insurers were resolved, we could hardly deal with the real issue of providing prompt and equitable compensation for those truly injured individuals.

From the outset, the insurance coverage questions badly separated the insurers and the producers. Disputes had led to major litigation, charges of bad faith and claims for punitive damages. We simply did not trust each other.

All did agree, however, that no true solution to the underlying tort litigation problem was possible, no establishment of an independent and fully funded Asbestos Claims Facility capable of processing claims, providing alternatives to litigation and defending lawsuits where necessary, was possible, unless insurers and producers could agree on what, in the end, comes down to the answers to the question of "Who pays for what?"

"When do they pay?" -- also had to be answered. The insurance industry had taken differing positions with respect to when an insurance policy had to respond to indemnify an asbestos defendant. Was it at the time the claimant was exposed to asbestos? Was it many years later when the illness manifested itself? When was it? There were substantial disagreements and bad feelings over these questions.

As you might expect, the answers to these questions evolved after months of bargaining and were heavily influenced by the judicial decisions applying to insurance policies -- decisions rendered before and during our deliberations.

In the early days, little substantive progress was made; there was too much friction. But eventually we all realized that progess depended on everyone's belief in the others' good faith. Each participant had to prove that he wanted the enterprise to work, that he was willing to give up something important to make it succeed, and that he was not using the "Wellington" group merely as a way of advancing his own company's special interest.

Together we were able, in a disinterested fashion, to evaluate the judicial decisions, look at the evolving law, and eventually devise an arrangement with which both parties could live.

In the final analysis, the one thing that kept us going was the knowledge that the alternative -- our present formal justice system -- simply is not working. It is too costly and is seen by almost everyone as no more than second best at dealing with the asbestos problem.

Facility Allows Planning For The Future

We now have a final agreement. It is an agreement that provides a much higher level of certainty for both producers and insurers, allowing us to devote our energies where they really should be -- seeing to it that the truly injured workers are compensated in a timely and equitable fashion.

I would like to take this opportunity to commend Aetna's Jack Shea who headed the insurers negotiating group. Jack proved to be not only an outstanding lawyer, but a gentleman as well. It was a privilege to work with him in hammering out this agreement. We also are greatly indebted to the extraordinary leadership that Dean Wellington brought to bear on this problem and to the cooperative spirit of both producers and insurers every step of the way.

We all hope and expect that the Facility will permit us to now get back to productive business. We will be able to plan our future in the sense that the dimensions of our liability will now be known. So for us, for our employees, shareholders, the economy of our country -- and most of all the injured workers -- our Agreement is an important milestone.

Thank you.

July 12, 1985

RESPONSES OF PANEL TO QUESTIONS
SUBMITTED BY SENATOR NICKLES

1. Will the Facility handle claims for asbestos-related gastrointestinal cancer, asbestosis, lung cancer and mesothelioma?

Mr. Baldwin: The Facility will handle all claims for asbestos-related bodily injury, exclusive of claims for statutory workers compensation benefits.

2. Will any claimant with an asbestos-related injury be eligible to use the Facility?

Mr. Baldwin: Any person with an asbestos-related injury who has been exposed to the asbestos or asbestos-containing products of Facility subscribers is eligible to have his or her claim handled by the Facility. Following the initial eligibility determination, the Facility will evaluate the person's claim with a view toward making him or her an offer. If a claimant does not have an asbestos-related impairment or dysfunction, the Facility will agree to toll any applicable statutes of limitations and provide the claimant with an opportunity to return to the Facility or the tort system if a compensable asbestos-related injury later develops. At any time prior to the election of binding alternative dispute resolution by the claimant, he or she will have the right to return to the tort system. We believe that this built-in safeguard will enhance the fairness of the Facility.

3. Will claimants wishing to use the Facility require the services of an attorney and, if so, will the Facility be involved in attorney-fee arrangements in any way?

Mr. Baldwin: We believe that attorney fee arrangements are a matter between the attorney and client, and we do not intend to involve the Facility in them. Whether a claimant desires the services of an attorney in pursuing a claim within the Facility is entirely within the discretion of the claimant.

4. At last year's hearing, defense costs were estimated at 37 percent of the total expenditure per claimant. For those claims that continue through litigation in the tort system, will defense costs be significantly reduced from this amount?

Mr. Baldwin: Let me emphasize that we believe that many claimants will find the Facility to be a sufficiently attractive alternative to the tort system so that defense cost expenditures in those cases will be reduced to zero. In cases, however, where the Facility is forced to defend claims in the courts, it will do so on behalf of all its subscribers with a single team of defense counsel, thereby dramatically reducing defense costs. We believe that these reductions in defense costs ultimately will inure to the benefit of the claimants by making more insurance dollars available to pay claims.

5. How will the Facility be staffed and financed?

Mr. Thomas: The Facility will be financed virtually entirely by Insurers on the basis of the comprehensive insurance resolution agreement between Producers and their Insurers that was the subject of negotiations over the last several years. The Facility will be staffed from senior management on down by the most competent and experienced individuals available. A prime example of this commitment to competence and quality is the retention of Mr. Wade Coleman as Chief Executive Officer of the Facility. Mr. Coleman formerly was a Senior Vice President of Citicorp, and we believe will set the tone for our hiring program. At this time, we contemplate that the East Coast and West Coast offices of the Facility will require the hiring of approximately 140 individuals.

6. Do we understand properly that many of the asbestos insurance risks treated in the Facility have been ceded to reinsurers? What efforts have been made to obtain assurances of support from these reinsurers, and with what degree of success?

Mr. Thomas: It is not unusual for direct writers to reinsure large risks in some degree, and asbestos-related risks are no different from others in this regard. The degree to which asbestos-related risks have been ceded to reinsurers will vary from insurer to insurer. I believe it is safe to say that the support of the reinsurance community is important to the eventual success of this endeavor. While the Agreement establishing the Facility is an agreement between Producers and direct Insurers, we have made a substantial effort to obtain the support of our reinsurers for our participation in the Facility. Although all of us have had a

great deal of educating and learning to do, our dialogue with the reinsurance community has been most productive and will continue. We expect that as this dialogue continues, so too will the level of comfort and support of the reinsurers.

7. What elements of the "London market" are represented in the Facility?

Mr. Jackson: The London market, consisting of syndicates of Lloyd's of London and individual London companies, is well represented in the Facility. We have been involved on their behalf in these negotiations from the start, and we are extremely supportive of what we view as the right solution to a very difficult and complex problem. Support from the London market has included not only the participation and assurances of our direct writers, but demonstrations of support by those segments of the market that have acted as reinsurers and retrocessionaires (reinsurers of reinsurers) as well.

8. Approximately how much of the asbestos-related insurance and reinsurance that has been written is represented by those members of the London market that have subscribed to the Facility Agreement?

Mr. Jackson: I am not in a position to provide you with a particular assessment, although I will assure you that the participation of the London market is significant. It is for this reason and recognizing the importance of our efforts, that we have lent our full support to this historic endeavor.

Senator NICKLES. Thank you very much, Mr. Baldwin.

Our next panelist is DeRoy Thomas, chairman of Hartford.

Mr. THOMAS. Thank you. I am DeRoy Thomas, chairman and chief executive officer of the Hartford Insurance Group. Mr. Chairman, this is a very welcome opportunity to appear before your subcommittee in support of the Wellington agreement and the Asbestos Claims Facility.

The Hartford is the tenth largest property and casualty insurer in the United States, and we are one of the largest writers of comprehensive liability insurance for business risk. This is the kind of insurance which applies to the vast majority of asbestos-related claims.

Much of this insurance was written over a long period of time when asbestos was considered the material of choice and even mandated for governmental and industry purposes, including shipbuilding and schools.

Asbestos has now been determined to be a long-latency toxic substance. In some instances, 40 or more years may have elapsed between the first exposure to the substance and manifestation of a disease condition. The disease condition may or may not be attributable to that early exposure. There may have been intervening exposures.

Claimants often do not know whose product was involved, and this has led to their having to name multiple defendants. This has given rise to a myriad of problems with regard to the interaction of insurance coverage and the apportionment of the producers' respective liability shares.

At the present time, lawsuits flowing from the problems associated with asbestos-related claims severely undermine the responsiveness of our judicial system. Of even more significance is the fact that countless millions of dollars are being spent to resolve and decide technical issues for which there are really no ready answers.

Meanwhile, thousands of people who feel they have been aggrieved are left waiting endless years for disposition and resolutions of their claims. Further, the money that is being dissipated by the endless legal wrangles threatens the economic foundations of both asbestos producers and insurance companies. Of course, it reduces the amount of money available to pay valid claims.

I am sure that I need not elaborate on the potential effect that this can have on the level of public esteem for our civil justice system.

Why does the problem exist? Briefly, it is because there is no precedent in our business or in the law for happenings such as what has occurred in this instance. Asbestos policies are, for the most part, annual contracts.

Asbestos claims have evolved over a 40-year timespan. Insurance carriers and contract terms have changed many, many times for almost every producer. Evolution of the law applicable to situations such as this has been almost continuous.

And worst of all, the courts of our land are in disagreement as to how the insurance contracts apply to asbestos-related claims. We have had four major circuit court of appeals' decisions since 1974, and each of them has reached a different conclusion. The Supreme

Court of the United States has declined to review any of these cases, and so the conflicts remain unresolved.

This dilemma, coupled with the proliferation of third-party lawsuits, has had a number of serious consequences. The system is delivering to claimants only 37 cents of every dollar we spend. The volume of lawsuits threatens to overwhelm the courts and much of our judicial process.

We, as insurers, are faced with millions of dollars of punitive damage claims even though we were trying to follow the law as we understood it to be, and producers were left with uncertainty as to what their coverage was.

This unhappy state of affairs led a group of insurance carriers, producers, and attorneys for plaintiffs to convene, in October 1982, under the auspices of the Center for Public Resources, which is an organization dedicated to the resolution of disputes by methods of alternate dispute resolution rather than by legal procedures.

They engaged Harry Wellington of the Yale Law School as moderator to try to work out a compromise and to formulate an agreed set of new rules under which these problems could be resolved.

To illustrate the complexity of the task, I would like to briefly describe what is frequently involved in an asbestos bodily injury suit. A claimant who worked with asbestos in the shipyards during World War II and who may or may not have continued to work with asbestos products during the intervening years learns in 1978 for the first time that he is suffering from an asbestos-related disease.

He goes to an attorney, but he is unable to identify the manufacturer of the products to which he was exposed, nor is he able to identify the times or dates of his exposure. The attorney starts a lawsuit and, on the average, names 15 to 20 defendants.

Over the intervening years since World War II, each of these defendants had an average of probably four or five different primary insurance carriers and, accordingly, each defendant puts all on notice that he expects them to defend and protect him.

I am sure you can readily understand why this situation has resulted in a multiplication of attorney representation, with all the attendant expense. But this is only the first problem.

Arguments now arise over the question of the very existence and terms of policies that are 20 to 40 years old. Indeed, many cannot be produced by either party. The next happening is that each of the producers and their carriers deny their involvement and seek cross action against the other producers.

Meanwhile, the carriers become involved in a further argument among themselves as regards which one should be providing the defense and responding to the claim. It is not only a question of time, but it is likely that they interpret their coverages in different manners. This is not surprising because of the various unreconciled court opinions.

But there is still more. As a result of all the varying interests and positions, there are protracted discovery proceedings. Depositions are taken again and again of executive officers, impeding business operations. Worst of all, while all of this goes on, the aggrieved claimant sits and waits.

The complexity of these problems and the intensity with which respective positions were held were such that it required 19 months of nearly continuous, concentrated negotiation for the representatives of producers and insurers to reach an agreement.

It must be understood that this agreement was one of major compromises on both sides. The compromises are not necessarily supported in the case law everywhere, but they afford a solution to a problem that has never before confronted American business and, as noted, a problem that our courts have not been able to resolve in a uniform manner.

The major beneficial effects of the fundamental tradeoffs in the agreement are that the producers have maximized their potential coverages, thereby protecting themselves to the fullest extent possible, and the insurers have obviated the expense of countless millions of dollars of legal expense. The sum of both of these results is now that more money can be made available for the injured claimants.

Furthermore, the requirements attendant to the disposition of claims have been simplified. The participating producers have agreed to a generic formula whereby costs are assessed against each and every claim, and thus the controversy as regards producer product identification is overcome.

The participating insurers have agreed to the application of coverage. Thus, causal relationship is the only problem left to be resolved. The disposition of claims should be greatly expedited by these agreements.

Further, the Facility established pursuant to the agreement provides for and encourages alternate dispute resolution, which process, if followed by the claimants, will further expedite resolution of their claims. And to emphasize once again, no claimant is denied access to the court if the claimant wants to go there.

This agreement, called the Wellington agreement, is but the first step in the resolution of the asbestos claims problem. It is now necessary that a critical mass of producers and insurers agree to participate. The compromises as regards coverage application will not work unless widely accepted by insurers and reinsurers.

Likewise, in order that the expense savings for carriers be achieved so that they can extend the broader application of coverage, it is necessary that a critical mass of producers subscribe and thereby end the collateral legal expense that is being incurred.

Finally, there is one further matter to be considered. Insurance from its historical beginning is predicated upon a sharing of the risk. Every primary and excess carrier that enters into a substantial contract of insurance with a client proceeds in turn to reinsure its risk with reinsurers.

There is no privity of contract between reinsurers and the original insureds, or the producers. The reinsurer's contract is strictly with the insurance carrier. If reinsurers will not agree to apply their contracts to losses paid under this agreement, then the direct-writing insurers are faced with having to set aside one group of lawsuits only to initiate another.

If indeed this were only an inconvenience, it might be viewed as merely troublesome. But there is then the real problem of whether any insurer which wrote the underlying primary and excess poli-

cies can afford to disburse millions of dollars for which reinsurers should be obligated if it must then litigate this issue and hope for a successful result.

We believe, however, that reinsurers will recognize the benefits to them in following the lead of insureds who have become signatories to the Wellington agreement.

As we see it, no one has suggested or presented a better solution than the Wellington agreement. Indeed, the only alternatives at this time are those of continued litigation where everyone is a loser.

We strongly support the Wellington agreement and we are actively urging all producers, insurers and reinsurers concerned with asbestos to likewise support the agreement and the program.

I thank you.

Senator NICKLES. Thank you very much, Mr. Thomas.

The next panelist is Robin Jackson, chairman of the Asbestos Working Party of Lloyd's of London.

Mr. JACKSON. Good morning, Senator. I am Robin Jackson. I am a director of Merrett Syndicates Ltd., which is a company which manages a number of Lloyd's syndicates. But I am here today as chairman of the London Market Asbestos Working Party, a group of underwriters and claims people who came together in 1980. We are both direct insurers and reinsurers.

May I, on behalf of the London insurance community, say a few words on how we see the situation today. You should be aware that we in London, both Lloyd's and the London insurance company market, have a very significant involvement by way of reinsurance with the U.S.-based insurance companies and as insurers writing direct insurance policies.

We are, therefore, on both sides of the fence. We have, however, tried to keep our eye on the basic concern rather than become bogged down in parochial arguments. In London, we were quick to recognize the urgent need for a coordinated response to what was rapidly developing into an insurance market free for all.

It was necessary to put the needs of those who had suffered most first and to have an efficient method of dealing with the thousands of legitimate claimants. The London Asbestos Working Party was formed in 1980, as I said earlier, to provide the liaison and direction necessary for Lloyds and the London insurance company market to find a method for handling their commitments in a consistent and professional manner.

What has really distressed all of us in London so much is the grim reality that, on current performance, many of those suffering will not live to receive their damages and for many others compensation will come too late to provide any real relief.

If there is one reason for supporting this facility, it is this harsh fact.

There are over 20 major asbestos producers who have been drawn into the current litigation. In finding ways to compensate the claimants, many of whom worked with a wide range of asbestos products and, as Mr. Thomas said earlier, moved freely from job to job within various industries, the courts generously broadened the scope of the strict liability laws relating to products to such an

extent that the producers found themselves both vulnerable as a group and virtually defenseless.

Faced with the prospect of corporate extinction, a number of them invoked chapter XI, and all of them have to shake the dust off liability insurance policies purchased over a 30-year period.

The massive legal costs and the effect on old policy limits of many years' inflation made it necessary to maximize every dollar of insurance coverage. Inevitably, a close inspection of the policy wordings issued over those many years revealed apparent ambiguities which, of necessity, the producers felt they had to exploit.

The judiciary quite unfairly, in my view, even if understandably, felt it was its responsibility to maximize coverage to the producer insureds even if this was against the clear intent of both parties when they originally entered into the insurance contracts.

Lloyd's and the London insurance market have a major involvement in many of the liability insurances issued during the asbestos loss years. When issuing those early policies, insurers still regarded an accident as simply being something sudden and unintentional, and they thought they were providing coverage on that basis.

If, for example, a number of people were poisoned or injured by an explosion at a chemical plant, it would be easy to identify the time and cause of their injuries, and only those policies in force at the time the accident occurs would be triggered by that accident.

The position with asbestos-related injuries is, however, entirely different due to the cumulative effects of retaining asbestos fibers within the body arising from exposure to asbestos over a period of time.

The physical symptoms of disease can often take, as we have heard earlier, 10, 20, or even 30 or 40 years to appear.

This inevitably created problems for the insurance industry as to which policies would respond, but insurers were totally unprepared for the so-called stacking of policies allowed by the courts which effectively aggregated all the policy limits in force during the years of exposure to asbestos.

Instead of asbestos claims attaching to a single policy year, many insurers found that they were exposed on every policy issued over 20 years or more, up to their maximum limit on each policy. At the same time, insurers began to suffer the underwriting losses and depressed premiums which have been a feature of most classes of insurance in recent years and which have put enormous pressure on even the most diligent, reserving philosophies.

The irreconcilable differences over policy coverage and the huge dollar amounts involved inevitably put producers and their insurers into court, as we have heard earlier today. Insurers' difficulties were further compounded by conflicting judicial findings on whether they had a duty to defend, and therefore to pay unlimited defense costs, which continued even after the exhaustion of their policy limits.

Again, it was clearly not insurers' intention to give such coverage when they originally wrote those policies. The catalog of disasters for insurers did not end there. Many found themselves at loggerheads with their reinsurers, whose involvement in the absestos losses was guaranteed by the sheer magnitude of those losses and

whose interpretations of just how their insurances would respond differed widely from insurers' own understanding.

I give you the example of reinsurers accepting part of a risk on a quota share or proportional basis and sharing premiums and claims with the ceding insurer in equal proportions. Here, the reinsurer typically follows the reinsured's fortunes.

The stakes, however, are much higher, as is general in most of the reinsurances involved in asbestos, if the reinsurance is arranged on an excess-of-loss basis or nonproportional basis. Here, the risk premium is substantially lower, as reinsurers only start to pay when and to the extent that any loss exceeds the amount retained by the ceding insurer for its own account.

Since many reinsurance limits apply to each loss occurrence, such as the explosion at the chemical plant, whether these asbestos claims ought to be grouped into a single loss occurrence or into two or more occurrences became a critical issue dividing insurers and their excess-of-loss reinsurers.

On the one hand, insurers were faced with multiple losses, and therefore multiple retentions for their own account. On the other hand, early exhaustion by claims of ceding insurers' retentions meant that reinsurers' limits were totally exposed.

If reinsurers appeared slow to respond, it must be remembered that unlike the primary insurers, they did not have to take the full force of everything the courts were throwing at them.

The future—what does it hold? The Asbestos Claims Facility will not only resolve these coverage issues by mutual agreement, but more importantly it will investigate, process and speed up payments on the thousands of bodily injury claims which would otherwise prove unmanageable.

The facility is, however, not an option that will remain open to us forever if its participants, both producers and insurers, are forced into insolvency. Some experts predict that if present trends continue, even after all the policies have paid out their maximum limits, producers could still face enormous outstanding bodily injury claims.

To date, the enormous dollar amounts spent on legal costs alone will undoubtedly have a major detrimental effect on our already embarrassed insurance industry. The USA insurance industry has just suffered its sixth consecutive loss year from underwriting, with by far its worst figures in over 30 years.

Furthermore, it is the threat to continuing availability of essential insurance and reinsurance products that harms both insurers and their policyholders. To their credit, U.S. insurers are already working through the Insurance Services Office to introduce the new so-called claims made policy forms, which will eliminate a number of the old ambiguities and hopefully restore consistency to underwriting figures by setting finite loss limits.

Nevertheless, while uncertainty lasts and losses mount, there is an increasing chance of those asbestos losses contributing substantially to so-called domino insolvencies within the insurance and reinsurance industry.

It must be remembered that the assets of both reinsurers and insurers are not unlimited. What we must prevent is the type of litigation that has just started in San Francisco. Why is this necessary

when the Facility could ensure that valuable insurance dollars are more wisely spent?

We should not cause further expense and delay by resorting to the courts for remedies which are already within our reach, and there is clearly a real possibility of all this litigation hurting the very claimants that it is intended to help.

The sooner the spirit of compromise prevails over producers, insurers and reinsurers alike, and they unanimously adopt the Asbestos Claims Facility, the sooner we can start defusing this social and economic timebomb.

Thank you very much, Senator. As you gather, that was not the text that I already sent to you.

[The prepared statement of Mr. Jackson follows:]

TESTIMONY OF ROBIN A.G. JACKSON, CHAIRMAN, LONDON ASBESTOS WORKING PARTY

ASBESTOS CLAIMS FACILITY

1. The number of present and expected asbestos related claims is enormous, and the problems they are creating for the producers and insurers are unprecedented, both in terms of the total dollars involved and of the human resources needed to handle these claims.

2. The considerable liberalization and wide divergence in judicial interpretations on such critical issues as coverage triggers and continuing defence obligations have shaken insurers' confidence in their traditional approaches to policy wordings and risk evaluation.

3. The emergence of complex multiparty litigation drawing in laundry lists of producers and their insurers has escalated the cost of pleading and defending each aspect of each claimant's case to the point where it now takes nearly $2.00 of costs to recover $1.00 of damages.

4. Against this background of judicial uncertainty, already catastrophic losses, and the reality of property damage claims yet to come, the task of fixing meaningful reserves and managing cashflow to pay claims will continue to demand virtual clairvoyance and a near reckless courage from executives involved at primary level, as well as from their reinsurer counterparts.

   You might well ask if we are getting it right. I will show you how we propose to do just that.

5. During a significant period of the loss years involved Lloyd's and the London Market were playing a major part in both the direct and excess umbrella liability market in the USA, and therefore London's share of the policies involved is substantial.

6. Futhermore, as reinsurance is the device used by all insurance companies to lay off part of the risks accepted from their insureds, it automatically follows that an adverse claims experience will also affect the loss performance of supporting reinsurance programmes.

   Traditionally reinsurances have required specialised handling and can differ widely in their form and purpose. Similarly, the ways in which these asbestos claims impact reinsurers' accounts vary enormously.

   In accepting risks on for example a "quota share" basis, reinsurers share premiums and claims in identical proportions and on the same terms as the original policies, hence the catch-phrase "following the reinsureds' fortunes".

With multi-million dollar settlements and these complex reinsurance mechanics involved, modern reinsurers face a horrific loss scenario of 1980's claims situations armed only with the unsophisticated policy forms issued in the 1950's.

Since Domestic USA insurance companies rely heavily upon the availability of proper reinsurance facilities both in the USA and those provided in and through London Market, the importance of securing all reinsurers' support and cooperation on the Asbestos Claims Facility is therefore paramount.

7. In keeping with a long tradition for professionalism and fairness, London recognised at a very early stage the true extent of its financial and social obligations in the asbestos affair as well as the very real need for a coordinated, equitable response to numerous ongoing disputes over technical issues such as coverage triggers. Out of this recognition was born the London Asbestos Working Party, which is a panel of senior executives from Lloyd's Underwriters and London insurance companies who represent a complete cross-section of the London insurance community.

8. Given London's major role in the reinsurance sphere, and the amount of work done by the London Asbestos Working Party in recent months, I must impress upon all concerned with promoting the Asbestos Claims Facility the cohesion and value of London's contribution, our unequivocal commitment to making the Facility work and above all, our goodwill.

9. The Asbestos Claims Facility promises to bring order to an otherwise chaotic legal situation while controlling distribution of losses to insurers and ensuring efficient use of the insurance dollars available, not as legal costs, but in proper timely compensation for the claimants. Lloyd's and the London Market support the Facility because in broad terms it offers the only viable alternative to the present chaotic situation and it holds something for literally everyone (possibly even the lawyers, in the long term!).

10. The Facility is a good deal for producers, claimants and insurers alike because it will:

    a) set guidelines for handling the fundamental insurance issues of:-

       - allocating liability and expenses over various policy years.

       - regulating application of deductibles and self-insured retentions,

- allocating liability for "aggregate" and "any one loss" policy limits,

- apportioning disputed liabilities between primary, excess, and ultimately, reinsurance carriers;

b) provide an internal and informal arbitration mechanism for coverage disputes such as certain unlimited deductibles and applicability of exclusions, as an alternative to costly and protracted litigation;

c) introduce, by combining the first two benefits, a degree of certainty where none existed before, not only for insurers (and their reinsurers) wishing to determine their eventual asbestos commitment, but also for producers who would for example gain from the release of key personnel committed to claims processing;

d) offer centralised evaluation, settlement and defence of the numerous future claims arising on a scale which will otherwise swamp existing individual insurer and producer facilities. The opportunity is there for avoiding inefficiency caused by wasteful duplication or dilution of what are, contrary to public belief, finite market resources, and for sharing the initial investment and overheads of a single system with other participants;

e) provide centralised data capture and storage, giving the broadest base for future management exercises on aggregating losses and deductibles, reserving and the like;

f) achieve consolidation of negotiations, settlements and defences on numerous claims, and thereby reduce overall legal costs, improve the payment of damages to legitimate claimants, and present a "single" defence where literally dozens would have been pleaded before;

g) eliminate, as one of the Facility's preconditions, punitive damage suits against insurers, and avoid similar actions against producers, by reducing the delays giving rise to such actions and by the Facility itself being evidence of defendants' willingness to resolve claims promptly;

h) offer to producers an existing mechanism for continued claims handling on their behalf if, and this is a very real possibility for many, their total policy limits available are eventually exhausted by claims.

11. The Facility is therefore an imaginative venture which if it is to work will rely heavily on the good faith and motivation of its participants. It would be naive to regard the Facility as a cure for all our problems, as at this stage it can only deal with the most immediate one namely, the rapidly mounting bodily injury claims. However, the Facility may serve as a model for the handling of other types of claims as well.

12. Taken as a whole, and London is no exception, the world reinsurance market is not in good financial shape. Increasing losses and depressed premiums over many years have combined to send, for example, USA reinsurers' 1984 combined loss and expense ratios over the 125% mark. World reinsurers are faced with a scale and frequency of losses far in excess of anything contemplated by the established formulae that were used to compute their original loss projections.

13. It could be some time before recent premium increases start to improve results, and the basic reserve structure of the world reinsurance industry should not be further weakened by continuing uncertainty brought about by coverage disputes and outlandish legal expenses. It must be remembered that insurers are going to pay out substantial asbestos settlements, and that is happening now in 1985 and 1986.

14. Insolvencies and withdrawal of insurance and reinsurance companies from underwriting have made insurance headlines for 1984, and 1985 seems set to follow. If there is anything approaching a widespread failure by reinsurers to meet reinsurance obligations, either in the amount of claims payments or with long delays before paying, the knock-on effect for direct insurers, producers and consumers would be disastrous.

15. In historic terms, we are going through far worse than just a "bad patch", which might be discounted as attributable to a series of natural disasters coinciding with an economic downturn. On the contrary, what we have is a man-made disaster which will continue to plague us well into the 21st century, and possibly beyond.

16. For example, in the absence of judicial constraints the potential for virtually unlimited legal costs expenditure has grown out of all proportion to the original policy limits to which they relate.

17. The circumstances which have recently caused Reinsurers to take stock on this tradition of "sharing the reinsured's fortunes" and the far-reaching implications of the asbestos problem for the whole reinsurance market, means that no part of the insurance industry will remain untouched by the problem we face today, which if it is not contained, without doubt threatens to engulf the courts and the claims departments of producers and insurers until the next century.

18. Before government intervention and/or greater financial constraints deprive us by default of any choice or ability to act on this matter, we must adopt this Facility, as it represents the one and only chance of dealing with the asbestos problem ourselves. Despite the diverse financial and corporate interests which go to make up what we know as Lloyd's and the London Insurance Company Market, it is London which has consistently spoken with one voice in favour of the Facility. Indeed, in the medium and long term the insurance industry has far more to fear from this Pandora's Box of asbestos litigation, than by working together to help slam down the lid of that Box, and giving responsible, undivided support to the Asbestos Claims Facility.

Senator NICKLES. You did give me something different, and I appreciate both your statement and your written comments, in addition.

I have several questions and I will just throw these open to the panel and any of you who wish to respond may do so. Mr. Jackson, your last statement was that you hoped it would be a unanimous signup. It is obviously not going to be, or it does not look like it is going to be.

Can the Facility work if there is, say, a 70 percent participation?

Mr. JACKSON. I believe so because I believe that we have very little alternative, and I would like to see us start with 60 or 70 percent because I believe that once it is started, other companies who at the moment are standing on the sidelines would be encouraged to join once they have seen that the bandwagon is moving.

Senator NICKLES. Mr. Thomas, would you agree with that?

Mr. THOMAS. I would say there is only one problem with it, Senator, and it is something that only when we get all of the information from the producers will we really know, and that is we have to ask ourselves what it will cost the insurers that are participating to close ranks where there is not enough volume or substance of carriers to do that.

I think 70 percent might be a little light and I am just not ready to say that until I see what the figures look like. But my guess is we are getting very close to enough volume to proceed, assuming reinsurers will join us. I think that still remains a major issue.

Senator NICKLES. Your statement was very strong on the need for reinsurers to participate. Is there a lack of participation right now among reinsurers?

Mr. THOMAS. Well, domestic insurers, in general, have not yet made a decision to join the Facility. Happily, Mr. Jackson, along

with his working party, has led Lloyd's of London to join the Facility and to take a leadership position.

Hopefully, we will be able to persuade domestic reinsurers to join us. Those discussions have not yet taken place, and at the moment they have not refused to join, but they have not joined.

Senator NICKLES. If, in broad scale, a lot of reinsurers do not join, do you envision the Facility making progress and then those insurers turning around again in litigation and bogging down the reinsurers?

Mr. THOMAS. Again, I think it is just a little early. I would guess in a month or two, we can give you a more concrete answer after we have had some discussions. Hopefully, we will get enough reinsurers to join us so that that will not be necessary.

But, obviously, any insurer who has already signed up has to ask himself what his position would be if he were forced to litigate for reinsurance in every case where he made a facility payment.

Senator NICKLES. The Facility would basically be open and people, even if they did not elect to sign up by May 29, could still elect to participate at a later date?

Mr. THOMAS. Oh, I think once the Facility starts to operate, we would welcome every additional person as early as possible.

Senator NICKLES. The larger the percentage of participation, the more effective you believe the group would work?

Mr. THOMAS. I think that is absolutely right. More importantly, everybody is taking their responsible share of the problem, which is the really important issue.

Senator NICKLES. What about the dilemma you may find yourself in, whether it be a producer or whether it be an insurer or a reinsurer, where you have elected to participate and your competitor has not elected to participate?

Again, we have not had all the communication we would like to have from the nonparticipating companies that are involved. Do you see that being to their advantage or disadvantage, if you could put yourself on their side of the fence?

Mr. THOMAS. I think everyone has to look at it from their own point of view. We think that from the point of view of the industry in general, from the point of view of the claimant, and from the point of view of what society expects from business and insurers, there is very little choice but to participate.

But, obviously, we are not in a position to look at the dilemmas facing individual insurers or reinsurers and what is motivating them to join or not to join. But in our case, we think it is the appropriate thing to do and, frankly, important for the industry to solve this problem and for the producers themselves to solve the problem.

Mr. BALDWIN. I heartily agree with what Mr. Thomas says. On the producers' side, I think we have enough people to go forward with the Facility.

Senator NICKLES. Do you have a percentage of participation?

Mr. BALDWIN. We really do not know a specific percentage, but we really are convinced that there are enough producers to go ahead. Of course, that is not begging Mr. Thomas' points at all.

I would echo what Mr. Jackson said. I think it is going to be very difficult, particularly for producers, to remain on the outside and litigate and go to trial in all the jurisdictions all by themselves.

Senator NICKLES. Do you have any chapter XI companies that are participating?

Mr. BALDWIN. We have a condition sign-on from the Manville Corp.

Senator NICKLES. Have you had any indication whether——

Mr. BALDWIN. Well, it really hinges on the bankruptcy court as to whether the bankruptcy court would approve their participation or not, but they are conditionally signed up.

Senator NICKLES. Let me ask a couple of more maybe detailed questions, and if it is more appropriate, you can answer these at a later time. What standard of proof will be required for a claimant to establish that he has been exposed to an asbestos-containing product manufactured by one of the Facility's members?

Mr. BALDWIN. Can I jump in on that? We can do one of two things, Mr. Chairman. We could answer that at a later date, but one of the drafters of the agreement is seated somewhere right behind me here, and if you would give him permission to answer that at your pleasure——

Senator NICKLES. I have three pages of detailed questions that really do get into the nitty-gritty of what Senator Metzenbaum was trying to lead Dean Wellington into. They get into the diagnosis, the claimant procedure—the nitty-gritty of the issue. You might have him participate when we get started and then I will switch.

We also have a dilemma in the fact that we are having lunch with the President and voting on the MX and a few other things. [Laughter.]

Mr. BALDWIN. Senator, in view of that, why do we not take your suggestion that we take your questions and submit them in writing, if that is agreeable with you, whichever way you prefer?

Senator NICKLES. OK. There was quite a lot of discussion as far as participation on the claimants' attorneys. I know that all of you have been involved in discussions and in litigation as well.

I have heard all of you say in your statements that you felt like it was in the claimant's advantage.

Mr. THOMAS. Yes.

Senator NICKLES. Do you think that the claimants' attorneys will look upon the Wellington agreement or process to their advantage and to the advantage of the process as well?

Mr. THOMAS. Oh, yes. I think there is very little doubt about that and I think you have to understand that it will be a total failure for us if we spend the $10 or $15 million to put up the data processing system and hire the 120 or 130 people that will be necessary and establish a full facility and then find out that no one comes to our door.

So, obviously, we must find a way to expedite these results and to produce equitable solutions at a low cost, and if we cannot do that, the plaintiffs' bar will certainly turn back to the courts.

Senator NICKLES. How is the system set up? You mentioned some of the overhead, and so on, that is involved. Is that being paid for by participating companies on a pro rata basis?

Mr. THOMAS. Yes.

Senator NICKLES. Has there been any discussions as far as the fee arrangements for claimants' attorneys?

Mr. THOMAS. As far as I know, that has not yet been fully worked out, and obviously it will be a source of discussion as the details of claim handling are finally put into place. Clearly, the plaintiffs' bar will want to have some discussions with us on that subject.

Senator NICKLES. I am sure they will.

Mr. THOMAS. We may very well want to keep it outside the scope of the Facility.

Senator NICKLES. You mentioned the Facility and I think I heard Dean Wellington mention a board. Is that correct? Would there be a board of directors for the Facility?

Mr. THOMAS. Yes.

Senator NICKLES. Those would be elected, again, by participating companies?

Mr. THOMAS. Yes.

Mr. JACKSON. Equal representatives, I understand, from the producers and the insurers.

Senator NICKLES. And it will be financed by assessment or whatever?

Mr. JACKSON. Yes, by the number of claims you put through the system.

Senator NICKLES. What would be the effect on a claimant whose condition later deteriorates?

Mr. BALDWIN. Well, as I mentioned earlier, if the claimant comes in and has evidence of asbestos exposure, he would be given this yellow ticket that I mentioned, and could come back later and get an award.

Senator NICKLES. If there is proof, but no——

Mr. BALDWIN. Disability, dysfunction.

Senator NICKLES. Evidence of asbestos in the lungs or whatever, but no disability at that point, but if a malignancy occurred later?

Mr. BALDWIN. Right. A guy that worked at the naval shipyard, electric boat division up there at Groton that built the nuclear submarines, obviously was exposed to asbestos and his x rays show some evidence of some scarring. Yes; he could come back later if his condition deteriorated and he was disabled.

Senator NICKLES. Mr. Thomas, you mentioned that there was some compromise in this issue with the insurers, with the producers. Your biggest concern, as I could tell from your statement, was getting participating reinsurers.

Mr. THOMAS. That is right.

Senator NICKLES. Do you anticipate significant participation with the reinsurers?

Mr. THOMAS. Well, we have certainly had a major breakthrough when Robin Jackson's working party has led Lloyd's into the agreement because we think that is a very important reinsurer to participate.

We still, as I told you, have yet to have our discussions with the domestic reinsurers. We think they are a very important part of the problem and we think it is necessary that we get at least a good percentage of them along with us in the Facility.

Senator NICKLES. Mr. Jackson, what percentage would Lloyd's be as far as the reinsurance market?

Mr. JACKSON. I think that is a very difficult question to answer, Senator. I think if you were to go back into the early years, the 1940's to, shall we say, the early 1960's, until the U.S. insurance industry became more viable, then I think Lloyd's had a very large share of the reinsurance.

In the later years—I would say the middle 1960's to the late 1970's, the last period in question—there was a diminishing amount.

If I might just say we do not expect the reinsurers to join the Facility. What we are looking for is for the reinsurers to say to their ceding companies who will join the Facility that if you join the Facility, we will find some way of paying some of your claims that come through to us as a reinsurer.

They will not actually join the Facility as a full-fledged member, but they will reimburse the companies who do under a reinsurance contract, and a lot of these contracts go back over 20 or 30 years and they need a lot of clarification and some compromises.

Mr. Thomas has used the term a couple of times; a lot of compromises are going to have to be made by the reinsurers and their ceding companies.

But as to your original question, yes; Lloyd's had a very significant part to play in the early years.

Senator NICKLES. I appreciate your comment that they did not have to join the Facility.

Mr. JACKSON. Lloyd's has joined the Facility, or has provisionally agreed to join the Facility as a direct insurer. Lloyds writes both insurance and reinsurance. It would not be in as a reinsurer, but anybody who goes into the Facility who is reinsured in Lloyd's has been able to come to us and we hope we will be able to work out some compromises.

Senator NICKLES. Mr. Thomas, how do you assign that liability if an injured employee worked in two or three different companies and possibly four, or five, or six different insurance companies were involved?

Mr. THOMAS. Well, it is basically at the moment going to be done on an apportioned liability theory. It has not been fully pinned down in absolute detail, but basically we will know generally what share of historical liability each of the producers has had and what his insurance encompasses, and that will be the basis of the settlement agreement.

Senator NICKLES. You take a company like Mr. Baldwin's and you say, well, he had these companies, and you take XYZ producer and say he had these companies, and prorate the shares?

Mr. BALDWIN. Well, actually, one of the most difficult things that we had in the course of all this was determine who was going to pay what, particularly in producer's share. But we finally hammered out an agreement on each producer having a certain share of the liability.

That was based on a litigation history—what that producer had spent, what his awards had been. It was done in great detail by an outside consultant who helped us. We really worked out a share for each producer.

The way that it will work, Mr. Chairman, is that producer will bring his insurance portfolio in to the Facility and he will pay—let us say the award is $35,000 and his share is $10,000. He will pay $3,500 from his existing carriers, based on an exposure whenever the man was exposed. I do not mind telling you that was one of the difficult things.

Senator NICKLES. I am sure it was probably one of the most difficult. What effect would that have, say, on the San Francisco case?

Mr. THOMAS. Well, once everybody agrees between producers and insurers and reinsurers alike as to the proper handling of the exposure, the San Francisco case, I think, would fall of its own weight if they were all signatories, or at least agreed to participate in it as reinsurers and signatories. There would be no need for the case.

Senator NICKLES. That is an interesting thought. It might disappoint a lot of attorneys who are there. [Laughter.]

Mr. THOMAS. It would certainly ruin one of the most interesting courtrooms that they have had in a long time.

Senator NICKLES. Gentlemen, I appreciate your thoughts. I have one final question on the amount of awards. Do you anticipate the amount of awards going to the claimants themselves will be, on the average, what they have been? In our previous cases we heard of very generous rewards and we found cases where there were no rewards when possibly there should have been; they were all over the field.

Have you come up with averages? How is that assessment going to be made? Is it just strictly going to be negotiated?

Mr. THOMAS. I think myself it is going to have to be awards that are negotiable, be obviously satisfactory to the plaintiffs, and awards we think are justifiable. Otherwise, we will end up with very few customers in the Facility or an unhappy group of people within the Facility itself.

This has to be done on a balanced basis, and obviously the awards should be at least satisfactory enough to the plaintiffs that they prefer that to the difficulties of a trial and the burdens of proof that they would be faced with in a court.

Mr. BALDWIN. As Senator Metzenbaum pointed out earlier, awards are higher in some parts of the country. Cost of living is higher, wages are higher, and so forth, and we will take a geographical consideration into it.

As Mr. Thomas said, we have got to make this attractive to the claimants. I would just like to add one other thing. We always talk about the plaintiffs' bar and the number of claimants, and so forth. I have received letters from individuals, interestingly enough; one as recently as last week who saw an article in the New York Times and said, my husband was exposed. He is sick. Where can I file a claim? He obviously has not filed suit yet.

So I am sure that there are many, many people like that out in the United States.

Senator NICKLES. I do not doubt that.

Gentlemen, thank you very much for your participation with this Committee.

Mr. BALDWIN. Thank you.

Mr. THOMAS. Thank you.

Mr. BALDWIN. Would you want to give us that list of questions?

Senator NICKLES. Yes, I will submit those questions to you.

Mr. BALDWIN. That might be very helpful.

Senator NICKLES. Thank you.

Our final panelist is David Silberman, associate general counsel for the AFL–CIO. Mr. Silberman, welcome to the committee.

STATEMENT OF DAVID SILBERMAN, ASSOCIATE GENERAL COUNSEL, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ACCOMPANIED BY PEG SEMINARIO, ASSOCIATE DIRECTOR, DEPARTMENT OF OCCUPATIONAL SAFETY, HEALTH AND SOCIAL SECURITY, AND JAY POWER, LEGISLATIVE DEPARTMENT

Mr. SILBERMAN. Thank you, Mr. Chairman. If I may introduce the two people with me, on my left is Peg Seminario, who is associate director of the Department of Occupational Safety, Health and Social Security of the AFL–CIO, and on my right is Jay Power, from the AFL-CIO's Legislative Department.

Mr. Chairman, we have submitted a written statement and, with your permission, we would ask to have that printed in the record and I will attempt to summarize it here.

Senator NICKLES. Thank you very much. It will be put in the record. Thank you.

Mr. SILBERMAN. We very much appreciate the opportunity to participate today and to participate in this committee's ongoing examination of the complex public policy issues raised by occupational disease.

We share the view that has been expressed this morning that the legal system is doing a grossly inadequate job of providing fair, adequate, and timely compensation to asbestos victims. And you, Mr. Chairman, know the statistics as well as I, so I will not recite them here.

Because we recognize the inadequacy of the legal system, we have read with great interest the Wellington agreement and listened to the testimony this morning. Our review leaves us uneasy—leaves us, as Dean Wellington suggested it might, skeptical—but not antagonistic, as he said, not uninterested.

We think the hearing this morning has made a great contribution in clarifying that the Wellington agreement is essentially a treaty between producers and primary insurers, and now some reinsurers.

As Mr. Baldwin put it in his written testimony, it answers the question of who pays for what. If the treaty holds, it should bring an end to the war between the two groups and reduce defense costs.

Despite the claims that have been made for it, however, the Wellington agreement does not in and of itself necessarily advance the cause of providing adequate and timely compensation to asbestos victims.

Whether the agreement will lead to that result or whether it will lead in precisely the opposite direction remains to be seen and depends entirely upon answers to questions that are not yet resolved.

The crucial unanswered question is whether the asbestos producers and insurers, having ended their own internal warfare, will

now proceed to seek peace with asbestos victims by offering fair and timely compensation or whether, instead, the producers and insurers will use their new-found harmony to wage a unified war of attrition against the victims who seek compensation.

Put more boldly, the crucial question is not who pays for what, but how much will be paid; how much will be made available to resolve asbestos claims, and how quickly will that money be forthcoming.

The Rand study suggests that 50 percent of the dollars spent on asbestos litigation goes for defense costs. Will those savings that result from reducing defense costs be made available to claimants, or will the producers and insurers pocket those savings and, having now reduced their own legal costs, do what they can to delay resolving claims of asbestos victims until the victims are forced to succumb to inadequate settlements?

On these questions, as I said, Mr. Chairman, the Wellington agreement is silent. The agreement, as we understand it, says that, "Detailed claim guidelines shall be used to evaluate and settle asbestos-related claims." But so far as we can determine, those guidelines have not yet been developed, and until they are in place and until we see them in operation, it will not be possible to evaluate whether the Wellington agreement furthers or retards the goal of fair and timely compensation. We therefore would urge the committee to monitor the implementation of this agreement to see how it works in practice.

I do state that if the subscribers to the Wellington agreement are truly committed to the worthwhile goals they profess—that is, to fair and adequate and timely compensation to victims—we at the AFL–CIO would welcome the opportunity to work with them in developing guidelines and procedures to achieve those goals.

As the representative of workers chosen in part to promote and protect health and safety, we believe that we can and are prepared to advocate the interests of workers without any other interests or obligations.

There is, Mr. Chairman, one final point that needs to be made here. There has been some suggestion that the Wellington agreement somehow demonstrates that government involvement in this field of occupational disease is unnecessary and that this matter should now be left to the private sector.

It would be a national tragedy if that misperception were to receive any currency. Government action is needed in the first instance to assure workers a safe and healthy workplace so that there will not be future generations of victims of occupational disease.

The problem we are discussing today is an eloquent testimony to the past failure of the law and to what the Justice Department told this committee last year, "an appalling history of corporate irresponsibility." As Senator Kennedy said at the hearings last year, "The asbestos crisis did not have to happen."

The hazards of asbestos were recognized during the early part of this century, and indeed in 1918 Prudential refused to issue life insurance to asbestos workers. But it was not until 1971, long after Great Britain had acted, that this country finally developed a standard to regulate occupational exposure to asbestos.

Even today, the standard that is in place has been demonstrated to be inadequate. Yet, the Occupational Safety and Health Administration has failed to take corrective action.

Further, until such time as we succeed in the ultimate goal of eliminating occupational hazards, Government will continue to play the role of adjudicating disputes between those who are injured and those responsible for the injury.

The real question facing the committee and the Congress is not whether Government should be involved, but how. Should Government be content to leave the task of compensation to the court system, with all its inadequacies, or should Government actively develop alternative compensation mechanisms?

In our view, given that Government is involved, it makes no sense to suggest that Government should play no role in developing alternative mechanisms. And we think the experience of the Wellington group actually highlights the need and usefulness of Government involvement for the very fact that this agreement has been so long in the making and is still not securely in place; that it addresses only the dispute between producers and primary insurers and not the needs of victims; that it is concerned only with asbestos and not with the host of other toxic substances that plague the workplace; and that the agreement came about only because of the litigation crisis of extraordinary proportion, all of those facts demonstrate that the only hope for a genuine, fair and comprehensive solution to the problem of occupational disease compensation is enactment of a Federal occupational disease compensation law along the lines that the AFL-CIO proposed in its testimony to the committee last year. We urge the committee to make enactment of such a law a priority item in this legislative session.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Silberman follows:]

No. 85-7

STATEMENT OF DAVID SILBERMAN, ASSOCIATE GENERAL COUNSEL, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS BEFORE THE LABOR SUBCOMMITTEE OF THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE ON OVERSIGHT OF A COMPENSATION PROGRAM FOR ASBESTOS VICTIMS

March 19, 1985

Mr. Chairman, the AFL-CIO appreciates the opportunity to participate in this hearing and in this Committee's ongoing examination of the complex public policy issues raised by workers harmed by toxic substances.

The AFL-CIO shares with the participants in the Wellington Resolution Group the view that the legal system is doing a grossly inadequate job of providing fair and adequate compensation to those workers who are suffering disabling illnesses, and to the families of those workers who have suffered fatal illnesses, as a result of having worked under conditions in which asbestos fibers were rampant in the air they breathed. Perhaps the most telling indictment of the legal system is the fact that to date fewer than 4,000 of the 25,000 claims that have been filed by asbestos workers and their families have been finally resolved.

Because we recognize the inadequacy of the legal system, we have read with great interest the Wellington Agreement; our review has left us uneasy -- but not uninterested.

What is apparent is that the Wellington Agreement, at bottom, is a peace treaty between the asbestos producers and their primary insurers. That treaty, if it holds, will bring to an end the costly war those two groups and their various factors have been waging over apportioning liability.

But despite the claims that have been made for it, the Wellington Agreement does <u>not</u>, in and of itself, advance the cause of providing adequate and timely compensation to asbestos victims. Whether the Agreement will lead to such a

result -- or whether the Agreement will lead in the opposite direction -- remains to be seen and will depend entirely upon the answers given to questions that, so far as we can determine, have not yet been answered.

The crucial unanswered question is whether the asbestos producers and primary insurers, having ended their internal warfare, will, through the Asbestos Claims Facility, now proceed to seek peace with asbestos victims by offering fair and timely compensation to the victims for the losses those victims have suffered or whether, instead, the producers and insurers will use their new-found harmony to wage a unified war of attrition against victims who seek compensation.

Put more starkly, the crucial question is how much money will be made available to resolve asbestos claims and how quickly will that money be forthcoming? The critics of the present system have long complained -- and rightly so -- that a large portion of the dollars that are expended on asbestos cases goes into the pockets of lawyers, rather than the pockets of victims. According to the Rand study on the costs of asbestos litigation, close to 50% of the total expense for such litigation goes for legal costs of producers and primary insurers. The Wellington Agreement should significantly reduce the amount of money paid to defense lawyers. But there is no assurance that those savings will be used to compensate victims rather than being pocketed by the producers and primary insurers. It is perfectly possible that those business men, having reduced their own legal costs, will now do what they can to delay resolving claims until the victims are forced by their desperate circumstances to succumb to inadequate offer of settlements?

As to this most critical matter, the Wellington Agreement is silent. The Agreement states that "detailed claims guidelines shall be used [by the Asbestos

Claims Facility] to evaluate and settle asbestos-related claims," but, so far as we can determine, those guidelines have not been developed. Until those guidelines are developed and are applied in concrete cases, it will not be possible to evaluate whether the Wellington Agreement furthers or retards the goal of fair and timely compensation. We therefore urge this Committee to monitor the implementation of the Agreement to see how it works in practice.

If the subscribers to the Wellington Agreement are truly committed to the goals they profess -- fair, equitable and timely resolution of asbestos claims -- we at the AFL-CIO would welcome the opportunity to work with them in developing guidelines and procedures to achieve those aims. As the representative of workers -- chosen in part to promote safe and healthy working conditions -- we can advocate the interests of workers without any conflicting interests or obligations. We stand ready to do so.

There is, Mr. Chairman, one final point which needs to be made. Some have suggested that the ability of the Wellington Group to arrive at an apportionment agreement to which a large number of producers and primary insurers are willing to subscribe somehow demonstrates that government involvement in the field of occupational disease is unnecessary -- that this entire matter can be left to the private sector for resolution. It would be a national tragedy of untold dimensions if that misperception were to receive any currency.

Government intervention is necessary, in the first instance, to assure workers a safe and healthful workplace so that there will not be future generations of victims of occupaticnal disease. The very problem we are here today to discuss is eloquent testimony to the past failure of law; as Senator Kennedy stated last year, "[t]he asbestos crisis did not have to happen." The hazards of asbestos were first

recognized during the early part of this century, yet it was not until 1971 that this country finally took steps to limit occupational exposure to this toxic substance. (In contrast, Great Britain began regulating asbestos use in the early 1930s.) And even today, the standard governing occupational exposure to asbestos has been demonstrated to provide insufficient protection to workers, yet the Occupational Safety and Health Administration has failed to take corrective action to remedy this situation.

Second, until such time as we succeed in the ultimate goal of eliminating occupational hazards from the workplace, government will continue to play its historic role of adjudicating disputes between those who are injured and those who are responsible for these injuries. The real question is not whether government should be involved in the process of compensating victims, but how: should government be content to leave the task of compensation to the judicial system -- to tort law -- or should government develop alternative compensation mechanisms that avoid the costs and delay of litigation?

Given that government is, of necessity, involved in the ongoing task of victim compensation, it makes no sense to suggest that government should play no role in developing alternatives to the tort system. Indeed, the experience of the Wellington Group highlights the necessity for governmental involvement. For the facts that the Wellington Agreement has been so long in the making; that the Agreement addresses only the needs of producers and primary insurers and not the needs of victims; that the Agreement is concerned only with asbestos and not with the host of other toxic substances that have injured thousands of workers; and that the agreement was possible only because a litigation crisis has developed with respect to asbestos cases all demonstrate that the only genuine hope for a fair and comprehensive solution to the problem of occupational disease compensation is enactment of a federal occupational disease compensation law along the lines that the AFL-CIO proposed in its testimony to this Committee last year.

Attached to this statement is a resolution adopted by the AFL-CIO Executive Council last month which details the steps that are required to protect workers and the public.

Thank you.

Statement by the AFL-CIO Executive Council

on

Protecting Workers and the Public

February 21, 1985
Bal Harbour, FL

Every year, more than 10,000 working men and women are killed by on-the-job accidents, 100,000 die of job-related diseases, and hundreds of thousands more are disabled and deprived of the chance to live productive lives.

The Occupational Safety and Health Act (OSHA), adopted in 1970, made slow but steady progress during its first ten years. Standards for toxic substances were issued, effective enforcement machinery was established and education and training programs were developed to inform workers about health and safety hazards on the job.

OSHA's life-saving efforts were halted by the Reagan Administration. In its first term, the Administration rolled back existing standards, cut enforcement, and moved to limit the rights of workers and their unions under the law. OSHA professionals have been replaced by political ideologues; the scientific recommendations of the few remaining health and safety professionals are vetoed or ignored by administrators committed to deregulation at all costs. OSHA now acts to protect the lives and health of workers when compelled by court order or congressional pressure.

The Reagan Administration poses as a protector of workers, but claims that the Administration's programs are working are demolished by recent government reports that injuries are increasing in agriculture, construction, communications, retail trade and many manufacturing industries.

Safety and health hazards in the nation's workplaces are widespread and growing, and for four years the Administration has done virtually nothing to alleviate them.

As a result, while 10,000 workers die each year of asbestos-related cancers, hundreds of thousands more continue to be exposed to asbestos in virtually all kinds of work.

Millions of Americans are routinely exposed to benzene, methylene chloride and other toxic solvents that cause brain damage, nervous-system disorders and cancer.

Disabling back injuries and repetitive-motion trauma caused by poor job design are widespread, robbing workers of their health and costing billions of dollars in compensation, medical costs and lost productivity.

The proliferation of video display terminals is putting millions of white-collar workers at risk of muscular and vision problems, job stress and possible reproductive hazards.

Toxic gases or lack of oxygen in confined spaces, along with malfunctioning machinery, claim thousands of lives each year.

Mining accidents kill hundreds and injure thousands each year. The death of 27 miners in Wilberg, Utah, last December in an explosion caused by a production speedup ordered by management is grim proof that profit still outweighs human life.

As the catastrophe at Bhopal, India, demonstrates, industrial health and safety hazards pose an immediate threat to whole communities, as well as to workers. Chemical spills and releases, contamination of work clothing, and exposure to reproductive hazards put family members, neighbors and future generations at risk.

The labor movement is moving to overcome the effects of the Administration's repudiation of the Federal responsibility to protect workers by doing more at the bargaining table and in state and local legislatures.

Many unions have won agreements that improve health and safety standards, establish research and training programs, and give union representatives wider participation in job-site health and safety activities. Such agreements go far toward protecting organized workers. But workers who lack the protection of a union contract often remain defenseless.

Because our concern extends to all our fellow citizens, the labor movement reaches out to local safety, health, environmental and allied organizations that share our goals. Through the work of such coalitions, 19 states and dozens of cities have adopted right-to-know laws covering chemical hazards, many of which guarantee public access to chemical information, as well as protecting workers. The effort to provide community-wide right to know protection must be given an even higher priority pending resolution of the legal controversy concerning the validity of state and local workplace right-to-know laws.

The labor movement and its allies are pressing in a number of states for legislation to regulate the use of video display terminals and to require certification and training for asbestos removal.

Further, in the absence of meaningful government enforcement of worker-protection laws, unions are seeking to improve working conditions through product-liability suits and criminal prosecution of employers who cannot be induced to protect human life and health except by compulsion.

The AFL-CIO is committed to secure protection of the health and safety of American workers through every possible means. To that end, and to establish a progressive national safety and health agenda for the 1980s, we pledge to take all steps necessary to:

* Restore the integrity and secure the full and effective enforcement of the Occupational Safety and Health Act and the Mine Safety and Health Act.

* Secure state and federal legislation guaranteeing strong, comprehensive right-to-know protections for workers and the public.

* Seek such laws and regulations as are necessary to protect workers and communities from chemical spills and emissions in order to ensure that such tragedies as that at Bhopal never take place in this country.

* Press for federal legislation to compensate victims of occupational disease and to provide for notification and treatment of workers who risk incurring such diseases.

* Persuade the Congress to strengthen environmental health and safety programs scheduled for reauthorization. Such actions should include better testing of chemicals and improved access to information under the Toxic Substances Control Act, stricter requirements under the Superfund law to protect the public and workers involved with the hazardous waste cleanup and stronger protective provisions under the Federal Insecticide, Fungicide and Rodenticide Act.

* Encourage the negotiation of labor-management agreements to improve safety and health standards, establish research and training programs and expand union participation in health and safety programs in the workplace.

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Fact Sheet

FACT SHEET

Agenda Adopted by AFL-CIO National Conference on Safety and Health

* **Effective OSHA and MSHA Programs** — Restore professional leadership at the agencies; improve standards, strong enforcement; training and education programs for workers.

* **Bring Health Standards into the 1980s** — Strengthened standards for formaldehyde, benzene, butadiene, isocyanates, wood dust, glycol ethers, methylene chloride, biological hazards and other workplace toxins.

* **Safety Standards for Fatality and Accident Prevention** — OSHA standards for confined space entry lockout of dangerous machinery, grain elevator safety and other safety hazards.

* **Protection Against Asbestos** — Safe practices to prevent asbestos exposure during construction, maintenance and demolition; tighter exposure limits for all occupational exposures, removal of asbestos from schools and buildings; licensing of asbestos contractors.

* **Right to Know** — Strengthen and enforce the hazard communication standard; state and local right-to-know laws for workers and the public.

* **Community Chemical Disaster Prevention** — Legislation and regulations to prevent Bhopal-like chemical spill accidents through right-to-know, control of hazardous chemical production and disaster planning.

* **Occupational Health Research** — Increase NIOSH funding for research, with specific funding for studies on VDTs and reproductive hazards.

* **Constructing a Safe Worksite** — No retreat from safety standards; a major new effort on construction health hazards; improved fatality and accident investigation and reporting; effective joint labor-management programs.

* **Protection of Public Sector Workers** — Legislation to cover state and local public sector workers under the OSHA law; improved regulation and enforcement for federal workers.

* **Recognition of White-Collar Hazards** — Scientific studies on VDT health hazards; legislation and regulation on VDT use; research and programs on occupational stress.

* **Right to Act** — Increased worker rights to participate in jobsite safety and health activities; to refuse hazardous work and to receive training and education.

* **Better Job Design** — Research, regulations and training on ergonomics (job design) to prevent back injuries, carpal tunnel syndrome and other injuries resulting from improper job design.

* **Occupational Disease Compensation** — Federal legislation to provide fair compensation and adequate medical treatment to workers suffering job-related illnesses.

* **Notification of Workers at High Risk** — Legislation and programs to notify and treat workers at high risk of occupational disease.

* **Alternate Enforcement Mechanisms** — Product liability actions and criminal prosecution of employers where willful disregard of the law results in injury, disease and death.

* **Strengthen Environmental Protections** — Improve the Toxic Substances Control Act and Superfund law to require better testing of chemicals and protection of workers and the public from hazardous wastes.

Senator NICKLES. Thank you very much, Mr. Silberman.

Mr. Power, do you have any additional comments?

Mr. POWER. No.

Senator NICKLES. Ms. Seminario?

Ms. SEMINARIO. No.

Senator NICKLES. You mentioned some legislation along the lines of last year's—was it drafted legislation or just some outlines?

Mr. SILBERMAN. Ken Young from the AFL-CIO testified last year and submitted thoughts along those lines, and the AFL-CIO was involved actively with Congressman Miller on the Miller bill and submitted draft language and proposals and provisions that were really the substance and structure of a bill.

Senator NICKLES. Was it pretty much Congressman Miller's bill last year, or close to it? That was the thrust of it?

Mr. SILBERMAN. We accepted that as a starting point and we had a number of suggestions and changes that we wanted to make in that bill before it was satisfactory to us.

Senator NICKLES. If I remember, Mr. Miller's bill did not have a Federal contribution. Some of the bills that were floating around did. I cannot remember if the AFL-CIO had a position for a Federal contribution.

Mr. SILBERMAN. We have taken the position that the principal responsibility in this area is the employer and insurer's responsibility. To the extent that the Government has some fault of its own because of its role with respect to asbestos, that poses a special problem. To the extent the Government was an employer or a coemployer, that poses a special problem.

But as a general rule, no. It was our view that this should be employer and insurer funded.

Senator NICKLES. After hearing today's testimony, have some of your concerns about compensating claimants been addressed or satisfied?

Mr. SILBERMAN. No. I would have been curious to hear the response to the three pages of questions that you have, Senator Nickles. The answers to those perhaps could have alleviated some of our concerns.

What we have heard so far this morning, it seems to me, is that the issues we are raising as to how much victims will get is a detail that has not yet been resolved, and it is precisely those details that are of critical importance to us.

Senator NICKLES. The response to that question was basically that participation would have to be satisfactory or else the claimants would continue to pursue tort litigation, thereby not gaining anybody anything. The same process would continue where the attorneys on both sides of the issue would walk away with the majority of the funds.

I am assuming that the AFL-CIO is more interested in the percentage and the timeliness of funds going to the claimants themselves.

Mr. SILBERMAN. Absolutely.

Senator NICKLES. And I emphasize timeliness. I think the drawn-out time procedure, as several of our panelists today have mentioned, is really a tragedy, particularly for those who are severely

disabled. To be drawn out in litigation for years and years certainly is not to their advantage, nor to anyone else's advantage.

I hope that through the process, whether it be strictly through Wellington or whatever other means are obtained here, we are able to eliminate that long, drawn-out time period and get some expedited compensation to those who are truly disabled and where there is really no question of disability in their cases.

You are as aware of it as I am; the complicated legal mess that the producers and the insurers and the reinsurers have found themselves in has bogged down the system to such an extent that the claimant is the person waiting out here. He does not care who pays him; he would just like to have some compensation in his latter years.

You indicated that detailed guidelines to evaluate the claims have not yet been developed and this subcommittee should monitor the implementation of the agreement. In concept, do you think it is possible for the Facility to meet the objective of providing fast, equitable compensation to asbestos claimants without the need for legislation?

Mr. SILBERMAN. It is possible for those people who go through the Facility, who are covered by people who joined the Facility, and who suffer from an asbestos disease, and to the extent the Facility is willing to include that disease. Yes, the guidelines could be such as to deal with these people's problems.

Senator NICKLES. You stated that the Facility addresses only the needs of producers and insurers and not the needs of victims. If guidelines acceptable to the AFL were developed and fast and equitable compensation were provided, as the Facility stated today, why are not the needs of victims addressed?

Mr. SILBERMAN. On both of those hypotheticals, I think that would address the needs of victims. What I intended to say is that the agreement that we now have addresses only the problems of producers and insurers. They have resolved their dispute, and now what we have to find out is are they going to make war or are they going to make peace with victims. Both choices are before them and each is equally open to them.

Senator NICKLES. I think certainly if they have a fast and equitable process and if it speeds up that process, it is going to help the participating companies. The real beneficiary is going to be the claimant who has found out that he has asbestosis and not too many years to live. Therefore he can begin getting some compensation.

If the claims are able to be resolved and if you can see an orderly process, I think that is going to be very much to the worker's benefit.

Mr. SILBERMAN. With emphasis on the word "equitable," we certainly would agree. The concern is that the producers and insurers could now say to the victim, look, guys, we solved our problem. It is not going to cost us very much to litigate this and we are prepared to litigate this until the cows come home to roost, unless you accept our terms, and these are our terms, and you surrender to those terms.

They have, in that sense, altered the tort system in a fundamental way. It is no longer possible for a plaintiff to go and say to the

least blameworthy defendant, look, we understand that you are the least responsible and that you have adopted a responsibility policy of settling, and we would like to make peace with you and settle our dispute with you and then we will continue fighting with the others. And our settlement with you will enable us to afford to fight with the others.

They have eliminated that possibility from the existing system, and whether they will now use this sort of monopoly power they have put together in a fair and equitable way or in an unfair, oppressive way is the big unanswered question.

I agree that if they use in the former way, in the equitable way, this is a net plus. If they use it in the oppressive way, it is a step backward. Which of those two is what we ask everybody to keep a close eye on.

Senator NICKLES. I appreciate your comment. If they use it in an oppressive way, the claimant would still have the remedy of going to the process that he is in right now, extensive litigation.

Mr. SILBERMAN. Not quite to the process that he is in right now because, as I have just suggested, right now he has a process where he can deal individually with the individual defendant.

An element of the Wellington agreement is that you do not deal individually with individual defendants. They are united as a group and either they all settle or nobody settles, so that they have altered the realities of the way the process now works in a significant way and a way that could work to the detriment of individual claimants.

Senator NICKLES. I appreciate your questions.

Do any of you have any additional comments?

Mr. POWER. No.

Senator NICKLES. Peg?

Ms. SEMINARIO. No.

Senator NICKLES. I appreciate your appearance today. Again, this is such a complicated and difficult subject; it is probably one of the more difficult ones that we wrestle with. I appreciate the participation and willingness of everyone to work together, and I look forward to working with others as well.

[Additional material supplied for the record follows:]

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April 11, 1985

Honorable Don Nickles, U.S.S.
Chairman
Senate Subcommittee on Labor
SH 608 Hart Senate Office Building
Washington, DC 20510

Dear Senator Nickles:

This is in response to your invitation on March 19th to hear from interested parties regarding the Wellington Agreement. I would request that this letter be made a part of the hearing record.

The company of which I am an officer has been in Chapter 11 Bankruptcy proceedings since November 1, 1982.

The company commenced operations as a manufacturer of industrial textiles, including asbestos containing products, in 1950. It prospered and grew over the years but remained in the category of a small business employing approximately 200 people in plants in Pennsylvania and New Hampshire.

As a small business and quality producer the company was encouraged to bid on U.S. Government contracts covering asbestos containing products specified by the U.S. Navy. Its success in securing U.S. Government contracts from the time it commenced doing business until 1982 has also served as a factor in jeopardizing its existence. Overwhelmed by some 10,000 personal injury law suits in which, in large measure, the company was denied insurance coverage by its carriers, it was compelled to file a voluntary petition for reorganization under Chapter 11.

A successful reorganization of the company and the preservation of more than 100 jobs of production workers depends upon the ability to structure a plan of reorganization which, within the financial resources available, deals with the existing personal injury claimants and those, exposed to the company's products, whose manifestation of injury lies in the future.

The company has and continues to explore the Wellington Agreement as a possible solution of its problems and also as a means of dealing with claims that are certain to be made in the future. The Wellington concept can, if it becomes operational, have a palliative effect but it will not take the place of legislation.

My judgment suggests that Wellington, to be effective, must be compulsory for claimants, manufacturers, producers and their insurers at all levels. However, as you are aware it contemplates a voluntary program and there is no legal mechanism by which it can be made mandatory. As pointed out at the March 19, 1985 hearing before your Committee, the plaintiffs will only use the claims adjustment system if they perceive that the amounts awarded are consistent with the amounts awarded by juries. While it is true that the number of defense counsel will be reduced so that only one law firm will represent Wellington producer participants, the benefits derived thereby will accrue to the insurer rather than the producer which has always believed that under disputed insurance coverage there was a duty to defend. Moreover, a producer needs large amounts of insurance coverage before Wellington can solve the litigation problem.

By the foregoing I do not intend to damn Wellington with faint praise. It is an excellent conception and for some plaintiffs and some producers may be an answer but it is not a panacea.

From the perspective of a small concern embroiled in Chapter 11 proceedings with a limited amount of insurance coverage and refusal of its excess carriers to participate in Wellington the benefits of the proposal are questionable.

It is also clear that a company in Chapter 11, regardless of size and resources, can only participate in Wellington if a plan of reorganization is in place which incorporates the Wellington Agreement. Moreover, no cash distributions can be made until the plan has been confirmed and court approval secured.

Thus for any producer, driven into Chapter 11 by personal injury or property damage claims on a mass basis, there will be barriers to participation in a Wellington or other private non-legislative, program which may prove insurmountable.

Reports are that the institution of law suits for asbestos personal injury continue to run at a high rate. This will cause an ever increasing delay in disposing of litigation and, in my judgment, leaves only one practical, fair and reasonable recourse - legislation substantially along the lines of HR 1626, the Asbestos Workers Recovery Act.

If I can be of any assistance to you in your consideration of this difficult problem I will be most willing to meet with you or members of your staff.

Very truly yours,

Victor L. Drexel
Vice-President - Law

cc: Honorable Howard Metzenbaum
Ranking Minority Member

Senator NICKLES. We will keep the record open for responses to those questions. The committee is adjourned.

[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

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